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*Jan 1914*

# OHIO CIRCUIT AND APPELLATE COURT REPORTS

NEW SERIES. VOLUME XIX.

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CASES ADJUDGED  
IN  
THE CIRCUIT COURTS AND COURTS  
OF APPEAL OF OHIO.

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VINTON R. SHEPARD, EDITOR.

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CINCINNATI:  
THE OHIO LAW REPORTER COMPANY.  
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**DEC 16 1914**

## JUDGES OF THE CIRCUIT COURTS OF OHIO.

HON. H. L. FERNEDING, *Chief Justice, Dayton.*

HON. PHILLIP M. CROW, *Secretary, Kenton.*

### FIRST CIRCUIT.

*Counties—Butler, Clermont, Clinton, Hamilton and Warren.*

PETER F. SWING ..... Cincinnati

EDWARD H. JONES ..... Hamilton

OLIVER B. JONES ..... Cincinnati

### SECOND CIRCUIT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,  
Madison, Miami, Montgomery, Preble and Shelby.*

JAMES I. ALLREAD ..... Greenville

H. L. FERNEDING ..... Dayton

ALBERT H. KUNKLE ..... Springfield

### THIRD CIRCUIT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,  
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,  
Union, Van Wert and Wyandot.*

MICHAEL DONNELLY ..... Napoleon

W. H. KINDER ..... Findlay

PHILLIP M. CROW ..... Kenton

### FOURTH CIRCUIT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,  
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,  
Vinton and Washington.*

THOMAS A. JONES ..... Jackson

FESTUS WALTERS ..... Circleville

EDWIN D. SAVER ..... Athens

### FIFTH CIRCUIT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,  
Licking, Morgan, Morrow, Muskingum, Perry, Richland,  
Stark, Tuscarawas and Wayne.*

RICHARD M. VOORHEES ..... Coshocton

L. K. POWELL ..... Mt. Gilead

R. S. SHIELDS ..... Canton

#### SIXTH CIRCUIT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,  
Williams and Wood.*

REYNOLDS R. KINKADE ..... Toledo  
S. S. RICHARDS ..... Clyde  
CHARLES E. CHITTENDEN ..... Toledo

#### SEVENTH CIRCUIT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,  
Harrison, Jefferson, Lake, Mahoning, Monroe,  
Noble, Portage and Trumbull.*

WILLIS S. METCALFE ..... Chardon  
JOHN POLLOCK ..... St. Clairsville  
MYRON A. NORRIS ..... Youngstown

#### EIGHTH CIRCUIT.

*Counties—Cuyahoga, Lorain, Medina and Summit.*

LOUIS H. WINCH ..... Cleveland  
WALTER D. MEALS ..... Cleveland  
CHARLES R. GRANT ..... Akron

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# OHIO CIRCUIT COURT REPORTS.

## NEW SERIES—VOLUME XIX.

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CASES ARGUED AND DETERMINED IN THE CIRCUIT  
COURTS AND COURTS OF APPEALS OF OHIO.

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### **AUTHORITY TO RELOCATE PORTION OF AN INTERURBAN LINE.**

Circuit Court for Summit County.

**CHRISTIAN REUSCH V. THE NORTHERN OHIO TRACTION & LIGHT  
COMPANY.\***

Decided, 1912.

*Bills of Exceptions—Taken in Time to Cover Preliminary Hearing in  
Appropriation Case. When—Statement of Grounds for New Trial—  
Right of Interurban Railway to Appropriate Land for Relocation of  
Line—Greatest Distance from Old Line One Mile—Meaning of the  
Words "Construction" and "Necessity" as Used in the Statute—Sec-  
tion 9119.*

1. It is not necessary that a motion for a new trial follow the exact language of the statute, if the causes enumerated as grounds for a new trial are such as are embraced within the meaning of the statute.
2. In an action by an interurban railway company for the appropriation of land, a bill of exceptions is taken in time to preserve the case for review as to the preliminary hearing, if the time allowed for such filing has not expired when computed from the overruling of the motion for a new trial.

---

\*Affirmed without opinion, *Reusch v. Northern Ohio Traction & Light Co.*, decided January 27, 1914.

3. When it becomes necessary for an interurban railway company to make changes in the construction of its road, or to relocate its tracks in order to avoid dangerous or difficult grades or curves or to shorten its line, the word "construction" as used in the statute will be held to include such alteration and to empower the company to appropriate land therefor.
4. The "necessity" required under the statute to authorize an appropriation of private property for railway purposes, is a reasonable as distinguished from an absolute necessity, and such reasonable necessity is established when it is shown that dangerous curves and grades will be thereby eliminated and the road made safer and its service to the general public rendered more efficient.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

This proceeding in error had its inception in an action begun by the defendant in error, the Northern Ohio Traction & Light Company, in the Probate Court of Summit County, to appropriate land belonging to Christian Reusch, the plaintiff in error, for a right-of-way. A preliminary hearing was had in the probate court as required by law and the questions at issue in that hearing having been decided in favor of the plaintiff in that action, a jury was called to assess the damages for the land taken. After the jury had returned a verdict assessing the damages for the taking of the land, the defendant in the action filed a motion for a new trial, which was overruled by the probate court and judgment entered for the plaintiff.

Error was then prosecuted by said defendant to the court of common pleas to reverse the judgment of the probate court. In the court of common pleas the petition in error was dismissed and the judgment of the lower court affirmed, and it is to review the action of the court of common pleas that the plaintiff in error brings this proceeding in error.

At the outset, it is urged by the defendant in error that the plaintiff in error is without standing in this court to ask for a review of any errors which the probate court may have committed in the preliminary hearing, for the reason that the bill of exceptions was not taken in time to preserve the case as to the preliminary hearing for review. A determination of the merits of this contention is therefore necessary at this time. Section 11046, General Code, provides:

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"On the day named in a summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon all these questions the burden of proof shall be upon the corporation, and any interested persons shall be heard."

Exceptions were duly taken by the plaintiff in error to the findings of the probate court on the preliminary questions, which said court was required to determine under the section of the statutes quoted, to the overruling of a motion for a new trial and to the entry of the judgment for appropriation. The bill of exceptions was allowed, signed and filed within the time required by law if the time is to date from the overruling of the motion for a new trial; but if, on the contrary, the time is to be computed from the day upon which the preliminary and jurisdictional questions were determined, it was not filed in time, and, in the latter event, there could be no review of the matters involved in such preliminary hearing.

In *The Pittsburgh, Cleveland & Toledo Railroad Co. v. Tod*, 72 O. S., 156, it was held:

"In proceedings for the appropriation of property by a private corporation, the determination of the preliminary questions by the probate judge, as required by Section 6420, Revised Statutes, may be reviewed on error.

"A motion for a new trial, or rehearing, of such preliminary questions is not necessary.

"The time within which a bill of exceptions on such hearing should be taken is to be computed from the day on which said questions are determined, if no motion for a new trial is filed, and if a motion for a new trial is filed, from the day the motion for a new trial is overruled."

In *The Dayton & Union Railroad Company v. The Dayton & Muncie Traction Company*, 72 O. S., 429, the syllabus reads as follows:

"Although it may not be necessary to file a motion for a new trial at the time of the hearing of the preliminary questions in an appropriation proceeding, under Section 6420, Revised Statutes, in order to bring upon the record errors occurring upon

such hearing; yet if such errors come within any of the causes for a new trial as defined in Section 5305, Revised Statutes, the aggrieved party may include the same in a motion for a new trial to be filed within ten days after the verdict is rendered in such appropriation proceedings, as provided in Section 6432, Revised Statutes. *Weaver v. Columbus, Shawnee & Hocking Valley Railway Co.*, 55 Ohio St., 491, approved and followed.

"If such motion for a new trial should be overruled, the time for filing a bill of exceptions must be reckoned from the date of the overruling of the motion for a new trial."

If, therefore, the errors sought to be reviewed by motion for a new trial were such as came within any of the causes for a new trial, as defined in Section 5305, Revised Statutes, now Section 11576, General Code, the time within which the bill of exceptions should be filed to secure a review of such errors should date from the overruling of the motion for a new trial, because by such motion the matters governed by it and embraced within the provisions of Section 11576, General Code, while having once been passed upon by the trial court were nevertheless by such motion again brought to the attention and review of the court.

The motion filed in the probate court by the plaintiff in error specified the following grounds:

First, the petitioner has no right to make the appropriation sought to be made herein.

Second, there is no necessity for the appropriation herein sought.

Third, the court is without authority to impanel a jury in this case.

These grounds in the language stated are not found in Section 11576, General Code; but, in our opinion, the questions raised by this motion could have been raised equally as well if the plaintiff in error had resorted to the language of the sixth subdivision of Section 11576, General Code, which is "that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law"; or if he had made subdivision eight of said section the ground of his motion for a new trial, which reads: "Error of law occurring at the trial and excepted to by the party making the application."

1914.]

Summit County.

It is not necessary that a motion for a new trial follow the exact language of the statute. If the causes enumerated as grounds for a new trial are such as are embraced within the meaning of the statute, it is sufficient.

We conclude, therefore, that the bill of exceptions was filed within the time required by law, and that it preserved for review the errors alleged to have occurred in the preliminary or jurisdictional hearing, embraced within the motion for a new trial.

The errors alleged to have occurred on the preliminary hearing in the probate court are:

First, that the court erred in determining that the plaintiff there had the right to make the appropriation sought; and

Second, that the court erred in determining the question of the necessity for the appropriation in favor of the plaintiff.

Third, that the findings of the probate court are insufficient.

Section 9119, General Code, as amended May 10, 1910 (101 O. L., 622), reads as follows:

"Street, interurban or suburban railroads using other than steam as motive power, when necessary may enter upon and use private property in the construction, alteration and operation of its road or any part thereof and for such purposes shall have all of the rights and powers of appropriation, outside of municipalities, that steam railroad companies possess."

The Northern Ohio Traction & Light Company is a corporation organized under the laws of the state of Ohio and authorized by its charter to operate street railroads. It is the owner of a line of interurban street railroads, a part of which passes through the township of Northfield, in Summit county, Ohio. The land sought to be appropriated is in the township of Boston, in said county. The appropriation of this land is sought for the purpose, as stated in the petition, of altering the location and grade of the company's interurban street railroad in order to change and avoid dangerous and difficult grades and curves, render its said line of interurban street railroad more safe for public travel, facilitate the movement of traffic in the operation of its interurban street railroad, and to enable said company to perform more efficiently and satisfactorily its duty to the public as a common carrier of freight and passengers.

As originally constructed, that portion of the company's road between Cuyahoga Falls, in said county, and Chittenden's Corners in said Boston township, was constructed on a private right-of-way except about one mile. The balance of the line running toward Cleveland was on the public highway. The plans of the company now involve the taking of the tracks from the public highway and relocating and re-constructing the same from Chittenden's Corners northerly to a point near Bedford in Cuyahoga county, and as a part of these plans the taking of the land of the plaintiff in error. The result of the carrying out of these plans will be to place the entire track from Cuyahoga Falls to Bedford on a private right-of-way, except for a distance of about one mile northerly from the power house at Cuyahoga Falls. The proposed new location will be easterly of the present one and the remotest point thereof will be about one mile from the present location.

It is argued on behalf of the plaintiff in error that Section 9119, General Code, above quoted, confers no right upon a street railroad or an interurban or suburban railroad company, to make such a change of its track as is contemplated in this case; and that the purpose of this section of the statutes is simply to regulate the manner of exercising the powers of appropriation when the right of appropriation is elsewhere conferred. It is further contended that no such right as is claimed on behalf of the company is anywhere conferred under the statutes of this state, and that therefore the company is without right to make the appropriation in question. The language of said section, however, is clear and unambiguous. A railroad of the class enumerated therein, "when necessary may enter upon and use private property in the construction, alteration and operation of its road or any part thereof."

It was held in *Commissioners of Lorain County v. Railway Company*, 11 C.C.(N.S.), 419, that:

"The word 'construction' as used in Section 3284, providing that a railroad company in the construction of its road-bed may divert a road or stream of water when necessary, is not limited in its application to the original building of the railroad, but gives the right, in making a change of grade as authorized by

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Section 3277, to divert the course of a highway for the purpose of avoiding annoyance to the public and dangerous or difficult curves or grades."

Following the principle of this decision, the word "construction" in Section 9119 should not be limited in its application to the original building of the company's road; but should be considered as relating also to the making of the road, or parts thereof, in such new location as necessity may require, conforming, of course, to the general route prescribed in the articles of incorporation.

We are of the opinion also that the word "alteration" should not be given the limited meaning contended for on behalf of the plaintiff in error. The necessity of an alteration of the company's line having been shown, it would be inconsistent with the language and clear purpose of the statute to require the alteration to be confined within the limits of the existing location of the road. The power conferred by the express terms of the statute upon railroads of the kinds enumerated to enter upon and use private property when necessary in the alteration of their roads, necessarily implies that such railroads have the right to change their route to the land so appropriated, otherwise the power conferred would be useless.

In *State v. Bregesson*, 108 Wis., 241, the court said:

"The alteration of a highway, as the word itself indicates, means the change of course of an existing highway, leaving it substantially the same highway as before, but with its course in some respects changed. While the alteration will necessarily require the condemnation of additional lands, and will result in the vacation or discontinuance of that part of the former highway not included within the limits of the altered course, the proceeding to alter a highway does not thereby become a proceeding to lay out a new highway or to discontinue an old one. The proceedings are separate and distinct, and intended so to be, and a new and separate highway can not be laid out upon an application to alter an existing highway."

If, therefore, it becomes necessary for a railroad company, of the kind named in the statute, to make changes of construction in its road, or to alter its line of tracks, it seems clear that the

language of the section of the statutes under consideration is comprehensive enough to authorize the company to appropriate private property for that purpose, the rights and powers of appropriation outside of municipalities being exercised in the same manner as by steam railroads.

The fact that a change of location of a portion of the company's track results, is no objection to the exercise of the right conferred, the necessity being shown therefor, provided there is no departure from the general route of the said railroad as prescribed in the company's articles of incorporation. Whether any public authorities can object to the change of location of the road, or whether the plaintiff in error can so object by some other method, is not the question to be considered here.

We think, therefore, that the probate court committed no error in determining the right of appropriation in favor of the plaintiff in the action.

To decide whether the probate court erred in finding in favor of the necessity of the appropriation, requires a consideration of the meaning of the word "necessary" as used in the statute. We think that when the word "necessary" is used in a statute of this kind, conferring the right to take private property for the uses specified, a reasonable and not an absolute necessity is intended.

This was the interpretation placed upon the word "necessary" in *Village of Wayzata v. Great Northern Railway Co.*, 67 Minn., 385, where it was held:

"Under a law which authorizes a railroad company to construct its road along and over any public or private way, if it shall 'be necessary,' a practical and not an absolute necessity is intended; and the burden of proof would be upon the company to show this practical necessity, if questioned when originally locating the line."

A similar construction was placed upon the word "necessary" in *Aurora & Genoa Railway Company v. Harvey*, 178 Ill., 477, where it was held (quoting from syllabus):

"The word 'necessary,' used in the Horse and Dummy Railroads Act of 1874 (Revised Statutes, at 1874, page 571) with

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reference to the right of a street railway company to condemn private property for the construction, maintenance or operation of the road, does not mean 'absolutely necessary,' but 'expedient, reasonably convenient' or 'useful to the public.' To avoid a dangerous grade crossing with a steam railroad, or a dangerously steep grade terminating at the bottom in a sharp curve, a street railway company may leave the highway and condemn a right-of-way around such obstacles over private property, in order to conserve the safety, comfort and convenience of the public."

This case, from its similarity to the one under consideration, and the thorough discussion of the principles involved, is an important one, and is of material assistance in disposing of the question to be decided here. The statute there relied upon, conferred power upon a street or horse and dummy railroad to take private property and declared that "when it is necessary for the construction, maintenance or operation of such road, or the necessary sidings, side-tracks or appurtenances, to take or damage private property, the same may be done."

The company in that case proposed to leave the highway and construct its road over private property for a distance of about a mile and a half for the purpose of passing under a railroad, and, failing to obtain all of the necessary property by purchase, brought its action to appropriate some of the property desired for carrying out its purpose.

Mr. Justice Wilkin, in delivering the opinion of the court, said:

"Counsel for appellees contend that the 'necessity' required by the statute in relation to horse and dummy railroads, means an 'absolute necessity,' a necessity so great that in the case at bar, if it is physically possible for appellant to construct and maintain its railroad upon the highway there is no right to condemn. We do not think such a strict interpretation should be placed upon the language of the statute. In the former opinion herein referred to we said: 'If, in the construction of the road in the highway, difficulties or obstructions were encountered which rendered it impracticable to construct the road in the highway, a necessity might arise, within the meaning of the law, which would authorize the company to leave the highway and go upon private property.' And again: 'In the construction of the road, if a necessity existed for making a deflection from the highway in order to avoid a heavy grade which would prevent a

successful operation of the road, defendant in error would no doubt have the right to take and condemn private property to obviate the difficulty.' The safety, comfort and convenience of the traveling public require protection, and the policy of the state must be to compel railroad companies to so build their roads as to conserve the safety of its citizens to as high a degree as is reasonably attainable in view of the character and exigencies of that mode of transportation. In the construction of statutes relating to the taking of private property the word 'necessary' should be construed to mean 'expedient,' 'reasonably convenient' or 'useful to the public,' and can not be limited to an absolute physical necessity. This, we think, was certainly the intention of the Legislature when the act was passed. The view here expressed seems to be well supported by the authorities."

See also *Buck v. Seymour*, 46 Conn., 156; *Milwaukee & St. Paul Ry. Co. v. City of Milwaukee*, 34 Wis., 271; *Commissioners of Parks v. Moesta*, 91 Mich., 149.

The necessity which the Northern Ohio Traction & Light Company was required to establish being a reasonable and not an absolute necessity, we are of the opinion that the probate court committed no error in determining this branch of the preliminary hearing in its favor. The evidence on this issue was sufficient to establish the reasonable necessity of the appropriation of the land of the plaintiff in error described in the petition filed in the probate court, for the purpose of eliminating dangerous grades and curves in the company's road, rendering it safer for those who had to travel thereon, and furnishing more efficient and satisfactory service to the general public.

There remains for consideration the contention of the plaintiff in error that the findings of the probate court are insufficient. The insufficiency is asserted to consist in the failure of the court to find, as required by Section 8754, General Code, "that the property and rights of those owning real estate along the portion of the road to be affected by the change will not be unreasonably affected."

The journal entry in the probate court contains a finding that the allegations of the petition are true, and the petition contains the allegation, "that the property rights of said defendants will not be unreasonably injured by said change."

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The finding of the court on this subject, therefore, was sufficient.

As a result of the conclusions announced on the errors assigned, the judgment of the court of common pleas must be affirmed.

### METHOD OF LISTING BANK SHARES.

Circuit Court for Lorain County.

C. M. IRISH v. T. W. FANCHER AND C. M. IRISH v. T. W. FANCHER.

Decided, April 29, 1908.

*Taxes—Bank Shares—Insolvency of Bank.*

Taxes on shares of stock in an insolvent banking corporation can not be collected from the assignee in insolvency of such corporation.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Two cases under this title are on our docket; the one a proceeding in error to the judgment of the court of common pleas and the other an appeal from the same judgment. Suit was brought by Irish, as treasurer of Lorain county, against Fancher, as assignee of the Citizens Savings Bank Company, for the collection of taxes, which, it is averred, stood charged against said banking company upon the books of the auditor of the county. The allegations are that the banking company is a corporation organized under the laws of the state of Ohio for banking purposes, that it is insolvent and that the defendant is the duly appointed and qualified assignee of such insolvent banking company under the laws of Ohio, followed by the averments that \$671.92 stands assessed upon the duplicate of the county, as taxes, upon the personal property of this insolvent banking company. The petition further avers that the claim for these taxes was presented to the assignee and that it was rejected; the prayer is that the defendant be ordered to pay these taxes in preference to all other claims which shall be held against the banking company.

Since the result, as we view the case, is the same whether we retain the case on appeal or on error, and since we are inclined to the opinion that the relief sought in the case would involve the equitable jurisdiction of the court, we have decided to and do dismiss the proceeding in error, and proceed to consider the case upon appeal, and the only question which need to be considered in the case is whether the banking company could be held liable for these taxes. For if it could not, surely the assignee can not be held.

It is provided by Section 2859, Revised Statutes of Ohio, that the treasurer of the county may bring suit against any person against whom any personal taxes shall stand charged, which shall not have been paid within the time prescribed by law for the payment of such taxes. But, it is urged that the taxes for which this suit is brought were never properly levied against this banking company, and this because of the provisions of the several sections of the statutes relating to the taxing of the capital of incorporated and unincorporated banks in the state of Ohio. By Section 2762, Revised Statutes of Ohio, it is provided that all the shares of the stockholders in banks shall be listed.

By Section 2765, Revised Statutes of Ohio, it is made the duty of the cashier of such bank to make out a return to the auditor of the county in which such bank is located, exhibiting in detail the resources and liabilities of the bank, with a full statement of the names and residences of the stockholders therein, with the number of shares held by each and the par value of each share.

By Section 2766, Revised Statutes of Ohio, it is provided that the auditor, after having fixed the value of the shares by the process set out in these sections, shall make out and transmit to the state board of equalization for banks a copy of the report so made by the cashier.

By Section 2839, Revised Statutes of Ohio, it is provided that taxes assessed on any shares of stock, or the value thereof, of any bank or banking association, shall be and remain a lien on such shares, etc., and that in case of the non-payment of such taxes within the time required by law by any shareholder, and after

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notice received from the county treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officer of such bank or banking association to transfer or permit to be transferred the whole or any portion of said stock, until the delinquent taxes thereon, together with costs and penalties, shall be paid in full, and no dividend shall be paid on any stock so delinquent, so long as such taxes, penalties and costs or any part thereof, remain due and unpaid.

By Section 2840, Revised Statutes of Ohio, it is provided that it shall be lawful for any such bank or banking association to pay to the treasurer of the county in which such bank or banking association may be located, the taxes that may be assessed upon its shares as aforesaid, in the hands of its shareholders, respectively, and deduct the same from any dividends that may be due or may thereafter become due on any such shares, or deduct the same from any funds in its possession belonging to any shareholder as aforesaid.

From these various provisions of the statutes, it seems clear that the manner of assessing taxes upon stock in Ohio and of collecting the taxes thereon, contemplates the assessment to be made against the shareholders. The cashier of the bank makes a return to the auditor of the property of the bank, but he, at the same time makes a return showing the names and places of residence of the several stockholders, together with the amount of stock held by each. This would seem to be for the purpose of enabling the auditor to fix the amount of taxes to be paid by each; and then the provisions that if the shareholders fail to pay, the taxes shall be a lien upon the several shares, and the stock shall not be transferred, and also the further provision in Section 2840 that the bank may pay the taxes assessed upon its shares in the hands of its shareholders and deduct from each the amount of the taxes paid for him, clearly, is a convenient way of paying taxes when a bank is entirely solvent, and the result would be exactly the same as though the several shareholders paid; but in a case like the present one, where the bank is insolvent, if we were to hold that the assignee should pay these taxes out of the assets of the bank, then we should be taking from the

agreement, undertook their collection without cost or expense to Gottschalk. Thereafter, without any authority from Gottschalk Beverstock wrote over the signature of Gottschalk upon the mortgage an assignment of the same to himself, and also without authority endorsed upon the notes above Gottschalk's signature "without recourse on me."

On the 28th day of July, 1910, Joseph Gottschalk died and the plaintiffs in this action are executors of his will. Four of the above mentioned notes were paid in full during the lifetime of Mr. Gottschalk and the proceeds were duly accounted for. Prior to the death of Mr. Gottschalk a payment of \$300 was made to Beverstock by the defendant Brown to be applied upon the note maturing in September of that year. This three hundred dollar payment at the time of the commencement of this suit had not been accounted for by Beverstock.

After the death of Mr. Gottschalk the executors served a written notice upon the defendant, Charles E. Brown, advising him that they were executors of the estate of Joseph Gottschalk and that any money due the estate should be paid to them, as such executors, and further notifying him that no one else had authority to receive any money or property due the estate. Thereafter, in September of that year the defendant Brown paid to Beverstock the balance due upon the note maturing in September, amounting to about \$205, and also paid to him the note maturing the following March amounting at that time with interest to \$512.50.

After these notes had been deposited with Mr. Beverstock he pledged them to the First National Bank of Bowling Green as collateral security to an indebtedness of himself and wife to the bank. It is conceded that the bank was a *bona fide* holder of these notes to the extent of the indebtedness to which they were deposited as collateral security.

On the 16th day of December, 1910, the plaintiffs filed their petition in this cause to obtain judgment upon the unpaid notes and to foreclose the mortgage securing them. On the day following, to-wit, December 17th, 1910, the defendant, Charles E. Brown, with his attorney went to the bank for the purpose of

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paying the notes and obtaining possession of them. It may be mentioned at this point that the defendant Brown had the right to pay those notes at any time by virtue of the provision to that effect contained in the mortgage.

Thereafter on the 26th day of February, 1912, a stipulation of settlement was entered into between the executors and Edward Beverstock, whereby he agreed to pay to them the sum of \$2,500, which was to be paid in installments as set forth in the stipulation. The stipulation provided that if the installments were not paid in accordance with the stipulation, "that plaintiffs were to have judgment against said Edward Beverstock upon the first day of the next term of the common pleas court, to-wit, April 8th, 1912, for the full amount of the claim sued upon in said cause No. 16602, less such payments as he shall have made thereon under this stipulation, and plaintiff was to be further privileged to proceed with the trial and determination of the issues in said cause No. 16602 as to the defendant, Charles E. Brown, and defendants other than Edward Beverstock, for the recovery of whatever may be still owing on said judgment, and the decree of foreclosure as prayed for in said cause was to be continued on the docket for that purpose but without prejudice to the rights of said parties other than Edward Beverstock."

This stipulation of settlement was made in this cause and embraced another action pending in the Probate Court of Wood County. The stipulation was filed in this cause without objection or exception by any party, and all parties assented thereto by consenting to the halting of the proceedings, so that the terms of the stipulation might be carried out.

At the time of the execution of this stipulation the defendant, Edward Beverstock, paid to the plaintiffs \$875. He made no further or other payment, and in accordance with the stipulation a judgment was thereafter entered against him in the sum of \$1,953.73. The cause thereafter came on to be heard upon the issues between the plaintiff and the defendants Brown. A judgment was rendered in favor of the defendants, Charles E. Brown and Julia E. Brown, and this action is prosecuted to reverse that judgment.

The court made a separate finding of its conclusions of fact and law, and the defendants, Charles E. Brown and Julia E. Brown, present a bill of exceptions and contend that the evidence does not support the finding of fact, but does show that defendants are entitled to a judgment in their favor. The plaintiffs in error contend that upon the finding of fact as presented, the judgment should have been in their favor instead of in favor of the defendants, and ask for a final judgment in their favor here upon the findings of fact. The judgment below was planted upon the conclusion of law that in taking the judgment against Edward Beverstock as above mentioned, the plaintiffs elected to proceed on their remedy against the said Edward Beverstock, and thereby released and surrendered their right to further proceed to recover from the defendant, Charles E. Brown, and that by such election their right to recover judgment against the defendant Brown became extinguished. This question has been argued at length, and the court have made a careful investigation of the question and have reached the conclusion that there is no evidence of an election of inconsistent remedies shown by the record in this case, which precludes the plaintiffs from recovering a judgment against the defendants Brown. It is clear that there was no intention to make an election at the time of commencing the suit, as both Brown and Beverstock were joined as defendants in the original action. No objection to this joinder was made by the defendants Brown at any stage of the proceeding. We express no opinion whatever as to whether such objection, if made, would have been sustained, but we see no reason why the defendants Brown should raise the objection, as the joinder was manifestly to their advantage. By a proper pleading they might seek a judgment in this same proceeding against the defendant Beverstock, and thus avoid any further litigation growing out of the subject matter.

We see no reason why the taking of a judgment against the defendant Beverstock first should preclude the defendants from prosecuting their action to judgment against his co-defendant Brown for any amount remaining unsatisfied on the judgment obtained against Beverstock.

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The terms of the stipulation clearly indicate that no election of inconsistent remedies was intended, as it is expressly provided that the entry of judgment should not operate to prevent the plaintiffs from proceeding with the trial against the defendants Brown.

It is claimed that these stipulations are not binding upon the defendant Brown because not signed by him. While it is true that the stipulation was not signed by him, it was entered in a case to which he was a party and was signed by his attorney, although he at the time was acting for the defendant Beverstock. Nevertheless the defendants Brown must be held thereby to have had notice of the execution of the stipulation and of its being filed in the case, and all that took place with respect thereto; and having this knowledge they have estopped themselves from a defense of want of knowledge of the stipulations and their affect by assenting to the staying of the proceedings in accordance with the terms thereof. Furthermore, the defendants Brown took the benefit of the payment of the \$875 made by Beverstock as a result of this stipulation. It would be inequitable to permit the defendants Brown to accept the benefits of this stipulation and then assert the stipulation and the judgment obtained against Beverstock in pursuance of it as a bar to the further prosecution of the action against them.

The doctrine of election as asserted and held in this case by the court below applies only to inconsistent remedies. We are unable to find that the remedies sought against these defendants are inconsistent. The plaintiffs were entitled to a judgment against the defendants Brown because of their liability upon the mortgage indebtedness, and they were likewise entitled to a judgment against the defendant Beverstock because of money paid to him by the defendants Brown on such indebtedness for the benefit of the executors. We are of the opinion that the case relied upon by the trial court in determining this question, 113 N. Y., 450. found also in 21 N. E., 172, is not applicable to this case. Our views as above enunciated seem to be entirely supported by the later New York cases: *Russell v. McCall*, 141 N. Y., 437, also reported in 36 N. E., 498; and *In re Huffman*, 136 App. Div. (N. Y.), 515, 520. We also think that the case of *Maple v. Railroad*, 40 O. S., 313, is applicable to this case.

We find therefore that the defendants, Charles E. Brown and Julia E. Brown, should be charged with the five notes remaining unpaid at the time of the death of Joseph Gottschalk together with interest thereon. Upon that indebtedness they are entitled to the following credits: 1st. The payment of \$300 made March 15th, 1910, to Edward Beverstock, which was before the death of Joseph Gottschalk. 2d. The amount paid to the First National Bank on December 17th, 1910, \$1,419.73. 3d. \$575 of the \$875 paid by Beverstock to plaintiffs on February 26th, 1912, making a total credit of \$2,294.73.

We have not computed the interest items, but interest will be computed in accordance with the dates in the notes and the payments as above stated and at the rate stipulated in the notes. It is claimed by the plaintiffs that the defendants Brown are not entitled to credit for the payment made to the bank on December 17th, 1910; that the notes were not yet due and that their payment at that time operated to the disadvantage and injury of the plaintiffs. It is conceded as above noted, that the bank was a *bona fide* holder of these notes as collateral security. The provision of the mortgage is that the defendants may pay \$100 or any multiple thereof at any time. The effect of this provision is to enable the defendants to pay the entire obligation at any time they may desire. They therefore were entitled, without giving any reason therefor and regardless of its effect upon anyone, to pay to the rightful *bona fide* holder of the notes the amount of indebtedness for which they were held as collateral security, and to this extent they are entitled to credit in the accounting.

We have disposed of the case upon a different theory from that resorted to in the judgment of the common pleas court. The facts upon which our judgment is based are shown by the undisputed evidence and insofar as the findings of fact are in conflict therewith, we disapprove of the finding.

The judgment of the court of common pleas will be modified in accordance with the above opinion and final judgment entered here in favor of the plaintiffs accordingly, together with an order of sale, and the cause will be remanded to the common pleas court to carry this judgment into effect.

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**ERROR IN DISMISSING CAUSE WITHOUT PREJUDICE.**

Circuit Court of Lucas County.

**THE LAKE SHORE ELECTRIC RAILWAY COMPANY v. SANDERS  
SHARP, ADMINISTRATOR.**

Decided, November, 1908

*Motion to Direct Verdict Dismissed Without Prejudice.*

At the conclusion of the plaintiff's evidence, a motion having been made to direct a verdict for the defendant which the court has announced it will grant, it is error to permit the plaintiff to dismiss the case without prejudice.

MARVIN, J.; WINCH, J., and WILDMAN, J., concur.

The plaintiff below was Sanders Sharp, as administrator, and he brought his suit against the plaintiff in error for the wrongful death of his decedent. In this opinion the terms "plaintiff" and "defendant" are used, meaning the parties as they stood in the court below.

At the close of the plaintiff's evidence the defendant moved the court to direct a verdict in its favor. After the arguments on this motion were concluded the court announced that the motion would have to be allowed. The plaintiff thereupon asked leave to withdraw a juror and continue the case. This was refused and the plaintiff then moved that the case be dismissed without prejudice and this motion was allowed and an order made by the court dismissing the case without prejudice. To reverse this order the present proceeding is prosecuted.

Section 5314, Revised Statutes, provides for the dismissal of actions without prejudice, and the first of said provisions is that it may be dismissed by the *plaintiff*, before the final submission of the case to the jury or to the court, when the trial is by the court. This is the only provision authorizing the *plaintiff* to dismiss the case without prejudice except a dismissal provided for in vacation. It is provided by the same section that *the court* may dismiss the case without prejudice where the plaintiff fails to appear at the trial, or for want of necessary

parties, or on the application of some of the defendants where there are others whom the plaintiff fails to prosecute with diligence, or for the disobedience by the plaintiff of an order concerning the proceeding in the action.

It is urged here that since the court had not directed the jury that a verdict be returned for the defendant, the case comes within the first class, to-wit, one that may be dismissed by the plaintiff before the final submission of the case to the jury or court, and that the action of the court in entering the dismissal, without prejudice, was simply authorizing the plaintiff to make this dismissal, as provided by the statute. This reasoning, we think, is not sound. The case of *Turner v. Pope Motor Car Company et al*, 19 Cir. Dec., 181, was in some respects like the case at bar. In that case, after the evidence on the part of the plaintiff had been concluded a motion was made that a verdict be directed for the defendant. That motion was taken under consideration by the court, and the court adjourned until the following morning. When the court convened counsel for the plaintiff announced a dismissal of the case, without prejudice. The court refused to enter the dismissal and directed a verdict for the defendants, which was at once returned by the jury. Error was prosecuted to the refusal of the court to enter the dismissal. In the circuit court the judgment of the common pleas was affirmed, the court finding that, in substance, the case was finally submitted upon the motion to direct a verdict within the meaning of Section 5314, Revised Statutes.

The same question under a statute similar to our own was passed upon by the Supreme Court of Nebraska, in the case of *Bee Building Company v. Dalton*, 68 Neb., 38. See also *Railroad Co. v. Dryden*, 17th Kan., 228.

These cases are familiar to counsel and need not here be quoted from.

We reach the conclusion that the court erred in dismissing the case without prejudice, and we reach the further conclusion that the case was submitted to the court, for when a motion is made to direct a verdict it amounts, as has been said in other cases, to a demurrer to the evidence, and raises a question of law for the

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court. The court was without authority to dismiss the case *without prejudice* but the court was not without authority to dismiss the case upon the motion of the plaintiff. His motion was in effect an announcement that he did not care further to prosecute this case. True, his motion implied that he hoped to be able to prosecute a case upon the facts undertaken to be brought out in this case, but the case had reached a point where, by this motion, the court, as already said, was authorized to dismiss it upon the plaintiff's motion, and the order should have been that the case be dismissed and should not have included the words "without prejudice."

Proceeding here to modify the judgment so as to make it conform to that which the judgment below should have been the judgment is that the case in the court below be dismissed.

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**SUFFICIENCY OF ALLEGATIONS CHARGING THE RECEIVING  
OF STOLEN GOODS.**

Circuit Court of Lucas County.

HARRY ROSENBLOOM V. STATE OF OHIO.

Decided, November, 1908.

*Criminal Law—Receiving Stolen Goods—Intent to Defraud—Sufficiency  
of Indictment—General Demurrer.*

1. In a criminal case a general demurrer under Section 7251, Revised Statutes, raises the question of whether intent has been alleged, and proof of it is necessary to make out the offense charged.
2. In an indictment under Section 6958, Revised Statutes, for receiving stolen goods, an intent to defraud is sufficiently alleged by the use of the words "unlawfully and fraudulently."

MARVIN, J.; WINCH, J., and WILDMAN, J., concur.

The only question in this case is whether an indictment seeking to charge the offense of receiving stolen goods, under Section 6858, Revised Statutes, is sufficient, if it has all of the formal particulars properly stated, together with the following words:

“That Harry Rosenbloom, late of the county aforesaid, on the 8th day of February, 1907, at the county aforesaid, unlawfully and fraudulently did receive 80 pairs of Pingree shoes, of the value of \$160 of the personal property of the Michigan Central Railroad Company, a corporation, then lately stolen, he, the said Harry Rosenbloom then and there well knowing said personal property to have been stolen, as aforesaid, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Harry Rosenbloom then and there, in manner and form aforesaid, unlawfully did steal, take and carry away the said personal property,” etc.

The sufficiency was challenged in the court of common pleas by a demurrer, specifying not only that the facts stated in the indictment do not constitute an offense, but also that an allegation is not made that the act done was with intent to defraud.

It is conceded on the part of the plaintiff in error that such indictment is good as against a general demurrer, and this is on the authority of *Whiting v. State*, 48 O. S., 220, where the exact question was raised. In that case it is said, in the third clause of the syllabus:

“It is an established rule of pleading that facts, and not conclusions of law, should be pleaded. Therefore, an indictment under Section 6858, Revised Statutes, which charges that the accused did unlawfully and fraudulently receive certain personal property—describing it and giving its value and ownership—knowing the same to have been stolen, sufficiently charges an offense under that section, without an averment as to the character of the offense he is thereby deemed to have committed.”

But, it is said, that the attention of the court was not challenged, in that case, to the failure to charge “intent” and that since Section 7251 of the Revised Statutes provides that, “The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged, and proof of the intent is necessary to make out the offense charged,” therefore the failure to charge intent is a ground of demurrer separate from the general demurrer, that the indictment does not charge facts sufficient to constitute an offense.

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It must be conceded that unless this contention be sound, there is some tautology in the language of the statute, and yet we are of opinion that the entire question is raised by the general demurrer.

Where intent is an ingredient of the offense, such intent is a *fact* to be charged. Offenses are only charged by allegations of fact and so if intent is a necessary ingredient of the offense, it is a *fact* necessary to be stated in the indictment. We think, therefore, that the question was distinctly raised in the case of *Whiting v. State, supra*, and that under the authority of that case, the indictment here was sufficient, and we might well rest our opinion upon this case alone.

In view, however, of the very able and carefully prepared argument on the part of the plaintiff in error, in which attention is called to other cases, we feel it proper to say something in addition to what has already been said.

Our attention is called to the case of *Drake v. State*, 19 O. S., 211, in which it is said, in the opinion:

"To constitute the crime of forgery, or of uttering or publishing as true, and genuine, etc., as defined by the statute, the criminal act must be done 'with intent to prejudice, damage or defraud some person or persons, body corporate or politic, or a military body organized under the laws of this state.' This *intent* is an essential ingredient of the crime, and must therefore be stated, and charged in the body of the indictment, in a *direct and positive manner*."

And the court goes on to say, in that case it is not thus charged. It will be noticed, however, that the statute under which that prosecution was had, expressly provides that the act must be done with *intent to prejudice, etc.*, whereas, the statute under which the indictment in the case now under consideration was framed, does not use these words. However, the fact is urged, and with good reason, that the party charged would not be guilty of a crime unless what he did was done with intent to defraud somebody, and it is urged that therefore, proof of intent is necessary to a conviction, and that such proof could only be required where the *intent* is one of the ingredients of the crime, necessary to be set out in the indictment. It may

be questioned, though it is not here necessary to decide, whether an intent to defraud is an element which must be proved in order to secure a conviction under this section, or whether want of intent, if there was want of intent, would not be matter of defense, after the fact of the receiving of the stolen goods, knowing them to have been stolen, had been established. But, however that may be, we think this indictment sufficiently charges a criminal intent in the use of the words "unlawfully and fraudulently."

It is true that these words may be used in such sense as not to imply *criminal intent*, but when used in the criminal law, the word "fraudulently" has been held to carry with it the intent of the party charged to have fraudulently done a particular thing.

In the case of *Bank of Montreal v. Thayer*, 7 Fed. Rep., 622, 625, it is said:

"Fraudulently," as used in an allegation that a person wrongfully, fraudulently, and falsely certified and represented certain things, "should be given the meaning which the law gives it, and which attaches to it in common usage, to-wit, a deliberately planned purpose and intent to deceive, and thereby be given an unlawful advantage. It necessarily includes the idea of a fraudulent intent."

In the case of *West v. Wright*, 98 Ind., 335, 339, it is said:

"An allegation in a complaint as follows, 'That said defendant at the time of said purchase of said lands knowingly, falsely, and fraudulently represented to said plaintiff that said lands were clear of all incumbrances,' is equivalent to a charge that the representations were made with intent to deceive."

We reach the conclusion in this case that the word "fraudulently" as used in the indictment, sufficiently charged that the intent of the party accused was to defraud although the word is often used in civil proceedings, and especially in equitable proceedings, in a sense not necessarily imputing a wrongful intent.

Surely, in view of the provisions of Section 7215 and the recognized forms of indictments used in this state and the de-

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cision of the case of *Whiting v. State*, this court would not be justified in holding that the demurrer to the indictment should have been sustained, and the judgment of the court of common pleas is therefore affirmed.

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**LIABILITY OF STREET RAILWAY COMPANY FOR COST  
OF PAVING.**

Circuit Court of Summit County.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY V. WILLIAM  
L. STEWART ET AL.

Decided, October 8, 1908.

*Street Railroad Franchise—Paving of Street.*

A street railroad company operating a single track on a street of a city, when said street was paved, paid for seven feet of the pavement as required by its franchises; nine years later the company laid another track in the street, replacing the pavement in good order; thereupon the city brought an action to recover from the street railroad company the cost of paving an additional seven feet, which the company would have been required to pay for if it had been operating two tracks at the time the pavement was first laid. *Held*: There could be no recovery for or on behalf of the city or of abutting property owners.

*Rogers, Rowley & Rockwell*, for plaintiff in error.

*Voris, Vaughan & Vaughan, C. M. Beery and N. M. Greenberger*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This is a proceeding in error brought to set aside the judgment of the court of common pleas. The suit was originally brought by William L. Stewart and the city of Akron for and on behalf of themselves and many others, the owners of real estate abutting on the north and south sides of West Market street in the city of Akron, between Canal street and the west line of the city. Later an amended petition was filed in which

Stewart was not joined, the city claiming to recover on behalf of itself and the other property owners named in the original petition. The relief sought was the recovery from the defendant of the expense which had been paid by the city and the property owners in the paving and improvement of West Market street between the points named, to the amount of seven feet in width of such pavement. The facts relied upon were that the city paved said street with brick in 1892. All of the expense of street crossings was paid by the city and one-fiftieth of all the other part of such pavement. The balance of the expense was paid by the abutting property owners, except that at the time of such improvement the predecessors of the defendant paid the expense of paving a strip seven feet wide along the entire length of the street, the predecessors of the defendant putting down a single track street railroad along the entire distance named and paying for the seven foot strip in accordance with the terms of the franchise under which it operated the line of street railway in Akron. In the year 1901, the defendant took up its single track before mentioned, which was laid along the middle line of the street. It removed the pavement so far as necessary to put in a double track, and then put in such double track, one on each side of the middle line of the street, and repaired the street so far as the same had been taken up, putting in the pavement all along where it had been taken up.

On the part of the plaintiff it is urged that the defendant should pay for the seven foot strip; that is, for an additional seven foot strip above that which it paid at the laying of the original pavement, because it is said it is clear that had the double track been laid at the time that the pavement was laid by the city, the company would have been required to pave fourteen feet instead of seven feet, that being the amount required to be paid by the company; that is seven feet for each track, and that therefore had the double track been laid at the time the city and property owners had to pay for the pavement, the property owners and the city would have been relieved of the expense of paving for said additional seven feet.

It is alleged in the petition that the company purposely laid but one track originally, intending to lay the additional track

as soon as the street should be paved and improved and paid for, thereby escaping the expense to which it would have been put had the double track been laid in the first place. It is not shown by the facts that this allegation is true. Nine years elapsed between the laying of the single track and the laying of the double track by the company. The company, by putting in the double track, was put to the expense of removing the first track, removing the pavement therefrom and putting in the pavement which had been removed. It would be a reflection upon the good sense as well as the integrity of those who put in the first track, to find that they did this for the purpose suggested of laying another track nine years later; that they would operate a street railroad with a single track where they ought to have a double one, for nine years, to relieve themselves from the expense of paving a strip seven feet wide. The allegation is not sustained. The franchise granted to the defendant's predecessor, referred to and made a part thereof, Section 437, subdivision 2, chapter 34, of the revised ordinances of the city of Akron, which reads, "Any individual or company to whom any such privilege shall be granted, upon any street or highway (that is, any privilege to lay street railroads), shall be required, when it is deemed necessary by the board of city commissioners to pave or repair, to macadamize or remacadamize such street or highway, or to pave or repave, macadamize or remacadamize, the space between the rails of the tracks, turnouts and switches used by them, and one foot on the outside of such rails on both sides of said track, through any street or portion thereof through which such street railway may pass; and such paving or macadamizing so done shall be with the same kind and quality of material that shall be used by the city." From this it is clear that the city could have required of the defendant, or its predecessor, to pay for both tracks had both tracks been laid when the pavement was put down, but it would be an exceedingly strained construction to hold that the city could require the defendant to pay back to the city what had been paid for a pre-existing pavement by it.

Our attention is called to the case of the city of Akron against this present defendant, wherein a recovery was had for the

value of a part of a pavement which the city had put in prior to the laying of the second track, there having been only one track before. We do not regard that case as decisive of this. We find from the record that this court allowed judgment to stand for the value of a part of that street, a part of the distance only was allowed, and that was affirmed by the Supreme Court. What distinction there was between that part where the court allowed the judgment to stand, and that part of the street where it was not allowed to stand, we do not know. It may be that the court found that the conduct of the company was for the purpose of defrauding, or the express purpose as charged in this petition of getting the pavement laid and then thereafter laying the track, the time between the laying of the pavement and the first track, and the time when the second track was put in was about half the time that it was in this case.

Other questions were argued in this case as to the right of the city to maintain this action and the like, but as what has already been said disposes of the case we deem it unnecessary to discuss the other questions. The result here is that the judgment should be reversed, and the judgment that should have been entered in the court below will be here entered.

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**COMPETITION IN METAL CABINETS OF SIMILAR DESIGN.**

Court of Appeals for Hamilton County.

**THE SAFE-CABINET COMPANY V. THE GLOBE WERNICKE COMPANY.**

Decided, January 31, 1914.

*Unfair Competition in Trade—Infringement of Rights of a Manufacturer by Putting Out a Similar Product—Injunction.*

The "cabinet safe" manufactured by the defendant from and after 1911 is so similar in size, shape, design and color to the "safe-cabinet" manufactured and sold by the plaintiff since 1905 as to easily confuse persons of ordinary intelligence as to the product which they are purchasing; and this fact, taken in connection with testimony to the effect that the defendant purchased one of the plaintiff's cabinets and caused it to be dissected in its factory, whereupon orders were given to manufacture one as nearly like it as possible without infringing the patent, affords ground for a finding that the defendant has been guilty of unfair competition and a decree enjoining its continuance.

*James L. Steuart, Gideon C. Wilson and John Emory Cross,*  
for plaintiff in error.

*Robertson & Buchwalter, contra.*

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

The action below was brought by plaintiff in error as plaintiff against the defendant in error as defendant, claiming that defendant had wronged and was wronging plaintiff by unfair business competition in the manufacture and sale of certain metal fireproof containers for papers, books and other articles, and in the use of the peculiar trade-name which plaintiff had originated for such manufactured articles. Plaintiff sought an injunction against the use of such trade-name and the continuance of such unfair competition, and prayed for an accounting and payment of all profits made by reason thereof.

On the hearing by the court of common pleas a decree was entered finding in favor of the defendant below and dismissing plaintiff's petition. To this decree and the proceedings below plaintiff prosecutes error in this court.

The entire record, embracing a volume of testimony containing almost 500 pages, together with a very large mass of exhibits consisting of newspaper and magazine advertisements, catalogues, circulars, cards, folders and numerous other forms of advertising matter, as well as the safe-cabinet manufactured by the plaintiff and the cabinet safe manufactured by the defendant, were submitted to the court.

After a careful consideration of this record and these exhibits the court finds that the plaintiff is a corporation organized under the laws of Ohio, about January 31, 1906, having then succeeded a partnership composed of Willis V. Dick and George D. Shad, of Marietta, who traded under the firm name of the Safe-Cabinet Company, and who founded the business now owned by plaintiff, in February, 1905, and then commenced the manufacture and sale of the goods known as safe-cabinets. This safe-cabinet was a novelty, manufactured from sheet metal in such a way as to leave an air space between two thin sheets of metal in which space was placed fireproof material in such manner as to become what is known as fireproof construction.

This partnership and its successor, the plaintiff corporation, were the pioneers in the manufacture and sale of goods of this character, and prior to their beginning in 1905 there was nothing known to the trade of the same character. The words "safe-cabinet" were applied to the article from its original construction, and have been so continued to the present time, and it has been known to the trade by such name during the entire period covered by its manufacture. During the early years of its manufacture, prior to 1909, the word "Dick" was used in different ways in connection with the name safe-cabinet, but the words "safe-cabinet" or "safe-cabinet company" appeared on all of these different products, and from and after the year 1909 the name-plate simply called it the safe-cabinet, putting on also the date of the patent, the name of the company and its place of manufacture.

These safe-cabinets were originally painted several different colors, but after numerous experiments and considerable expense the standard shape, finish and size for its product was

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finally adopted by plaintiff, and for several years prior to the filing of the petition, except in cases of special order, its safe-cabinet had been painted an olive green color with a decoration in imitation of paneling with gold or yellow lines. Plaintiff made large expenditures of money in advertising and creating a market for said patented novelty and its product so patented, decorated and labeled has been sold and resold under the designation of the "safe-cabinet" in domestic, interstate and foreign commerce. The public know and recognize said goods under such trade-name, and because of the merit of the article and the extensive advertising plaintiff has built up a valuable trade and good will in the manufacture and sale of said patented novelty, painted an olive green and decorated in imitation of paneling with gold or yellow lines and bearing designation of "safe-cabinet." The special name of safe-cabinet has thus become a trade-name, and has in this manner come to have a special or secondary meaning implying that the article with reference to which it is used is of plaintiff's manufacture, the combination of name, color and decoration becoming of value as appurtenant to the good will of plaintiff's business.

The defendant is an Ohio corporation which together with its predecessors has been continuously engaged in the manufacture and sale of office furniture, sectional bookcases, files and equipment, for many years, but did not manufacture an article similar to that manufactured and sold by plaintiff, prior to February, 1911. Before defendant engaged in the manufacture of said article there was no competition whatever between the goods manufactured by the plaintiff and those of the defendant, and the same agent represented both plaintiff and defendant in many cities throughout the United States.

In February, 1911, the defendant began the manufacture and sale of a fireproof container of practically the same shape and size as that of plaintiff, and likewise painted an olive green color and decorated in imitation of paneling with gold or yellow lines, and labeled the same "Globe Cabinet Safe." Plaintiff contends that the use of the name cabinet safe and the decoration of its goods with an olive green color and gold or yellow lines in

imitation of paneling, is a simulation by defendant of the goods of the plaintiff, and is a fraudulent attempt on the part of defendant to deceive and mislead the public and the customers of the plaintiff into the belief that the goods manufactured by the defendant emanated from the same source as those manufactured by the plaintiff, and that such acts amount to unfair competition in trade, the liability of deception being further enhanced by the fact that defendant also imitated the shape and most popular size of plaintiff's goods.

Plaintiff further claims that defendant's article is of inferior workmanship and design and insufficient as a fire resistant, and that while in outward appearance both articles are the same there is a wide difference in their respective merits, the plaintiff's article offering a resistance to a high degree of heat which the defendant's could not withstand.

The defendant claims that there has been no attempt on its part to mislead or to confuse or deceive anyone, and that no fraud or unfair competition has been shown as against the defendant. The defendant denies the right of plaintiff to the use of the words "safe-cabinet" as a trade-name, claiming that such a name is merely descriptive of the characteristics of the article, and that no one can acquire exclusive right to such a trade-name, and therefore claims the right to use the words in the manner in which it has been using them, to-wit, "cabinet safe."

Counsel for defendant admits, however, that grammatically construed these words would appear to have the same meaning, arguing that the first word should be taken as the adjective or qualifying word and the last word as the noun; that in the name used by the plaintiff "safe-cabinet" the cabinet would be the main feature qualified by the word "safe," while in the term used by the defendant "cabinet safe" the safe would be the main feature qualified by the word "cabinet." It is hardly necessary to analyze the meaning of the words as has been done by counsel for defendant, as such analysis shows no difference in their meaning. It might, however, be noticed that their use by the plaintiff was with the hyphen between the two words, using therefore both words as nouns and neither as an adjective,

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indicating in that way possibly the name of a particular thing that combines in an equal degree the qualities of the object known as a cabinet with the object known as a safe.

The evidence shows that the words had not been used together in such a way as to become known to the trade or to indicate any particular article, prior to their use by plaintiff or its predecessor. In this view of the facts it appears to the court that the name is one which might well be adopted and used by the company which first manufactured such an article, and that its subsequent use by a new competitor would be looked upon at least as a ground of suspicion, and taken in connection with other matters might lead to a finding of unfair competition.

It is contended also by the defendant and shown by the evidence that the use of olive green paint as a decoration for steel articles was a matter that had been common to the trade for many years, and defendant contends that because plaintiff and its predecessor had originally used other colors as well as that finally adopted by it as its standard that therefore there could be no objection raised by it or any claim made as to its exclusive right to use the color, which the evidence shows it has adopted and used as its standard some time before the defendant entered the field of competition.

It may be well said that no one can have an absolute monopoly of a particular color, but it has been shown by the evidence that prior to the commencement of the manufacture of the "Globe safe cabinet" by defendant, its standard color for file cases and other products had been colors in imitation of finished oak or mahogany wood, and for steel file cases that were not so colored it had used a maroon paint, and had been using other colors only on special orders.

These facts taken in connection with the fact that it disregarded its previous standards of wood imitations and made olive green its standard color for its new product, with gold or yellow lines to imitate paneling, and the fact that in its catalogue of new goods it carried on the margin a miniature safe-cabinet, or cabinet safe, printed in green ink, making its catalogue similar to that of plaintiff company, and also that it took as the size of its

product the most popular size that was used by the plaintiff company, shows too many matters of similarity to be altogether accidental and not to show that it was actuated by the desire to gain the benefit of the expense and effort that had been borne by plaintiff in stimulating and creating a market for its product.

The court is compelled to reach the conclusion that the defendant has been guilty of those acts which constitute unfair business competition, especially when it is further considered, as shown by the testimony of the president of the plaintiff company, that prior to the commencement of the manufacture of its cabinet safe, a safe-cabinet manufactured by the plaintiff was purchased by the defendant and was taken to its factory and dissected by its operatives with instructions from the president of the company to manufacture an article as near like it as possible, in such a way as to take in the file case units made by the defendant, and not to infringe on the patent of the plaintiff company.

Such a conclusion is further sustained by the fact that the evidence shows that agents who had been previously handling goods manufactured by both plaintiff and defendant were required by defendant to handle its goods alone, and to give up the agency for the plaintiff's goods or to lose the exclusive agency for the defendant's goods.

The case of *Yale & Towne Mfg. Co. v. Alder*, 154 Fed. Rep., 37, is almost directly in point, the facts being so similar. The syllabus of this case is as follows:

"A manufacturer of locks who deliberately and intentionally copied a higher-priced lock made by another manufacturer in form, size, coloring, lettering and details of finish, so that the two were substantially identical in appearance to a casual observer, and retail purchasers were likely to mistake one for the other, is chargeable with unfair competition, although the parts of the lock separately may have been open to his appropriation."

Upon an ocular inspection by the members of the court, the similarity of the appearance of the two articles made respectively by plaintiff and defendant and shown as exhibits in court was sufficient almost of itself to convince the court that one was a

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"Chinese" copy of the other. While if critically examined together points of difference might be discovered, it would be impossible for anyone not having first so studied them and memorized these differences, to properly describe them and identify the product of either party with that of the other party not then before him.

On such a state of facts it is clear that the casual ordinary buyer at retail, not having both articles before him and not knowing the points of difference or, possibly, even that there are two distinct manufacturers, but having read plaintiff's advertisements and having decided to buy a safe-cabinet would easily be induced to buy defendant's cabinet safe, feeling that he was securing what he had intended to purchase.

The plaintiff contending that the similarity of the two products is sufficient to confuse or deceive purchasers, defendant undertook to point out certain differences. For instance, that the plaintiff's article had a cornice around the front and both sides at the top, while defendant's has none at the sides because of its desire to carry out its idea of elastic furniture by adding, if occasion demands it, other cabinets at the side without leaving any space between the two. This furnishes a reason for omitting the cornice at the sides, but does not give a reason why when omitted the cornice on the sides it should be still retained on the front.

A difference in the hinges was also referred to by one of defendant's witnesses, but when he was asked to explain wherein the difference lay he was unable to do so without again referring to them and then making comparison between the two articles then in court. And the court was impressed with an incident which took place during the argument, when counsel for defendant undertook to point out the difference between defendant's article and that of plaintiff in court, and himself pointed out plaintiff's article as the product of defendant. If such confusion could arise with a witness and counsel, who had both prepared for trial and were clearly advised of all points of difference in the two articles, how can it be said that no confusion or deception will arise with the ordinary casual purchasers in

the market, who after all are the persons to be protected, and whose trade plaintiff is entitled to receive if he has legitimately secured it.

In the case at bar it is clear that the demand for plaintiff's goods was created before the defendant entered the field, and being in a similar business this demand was brought to the attention of the defendant by its agents and salesmen, and it did not hesitate to at once take advantage of the opening thus created to embark in the same business that had been made so successful by the plaintiff. We have stated above how the defendant first dissected the safe-cabinet of the plaintiff and commenced the manufacture of its cabinet safe in close imitation of it. While the defendant strenuously insists that its article is superior to that of the plaintiff, the plaintiff as strongly contends that its own article is the superior. For the purposes of this case, which is the better is not material. The real question becomes, who was the pioneer in this manufacture? There is no dispute in the record but that the plaintiff had an established business before the defendant commenced, and there can be no question but that the marked similarity of defendant's product was for the purpose of availing itself of plaintiff's trade and securing a part of its good will, and that the conduct of the defendant comes within what is known as unfair competition.

Defendant, however, contends that it has put out no goods except with the name "Globe" upon them, that is, the name-plate carries the words "Globe Safe Cabinet." Such use of defendant's name is not in itself a sufficient affirmative distinction where, as here, there are sufficient points of similarity to constitute unfair competition.

In *Menendez v. Holt*, 128 U. S., 514, the Supreme Court says in its opinion, at page 521:

"It is no answer to their action to say that there was no invasion of that right because the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name of Holt & Co. That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor."

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See also to the same effect: *Shaver v. Heller*, 108 Fed. Rep., 821; *Jacobs v. Beecham*, 221 U. S., 263; *Rushmore v. Manhattan S. & S. Wks.*, 163 Fed. Rep., 939.

*Enterprise Mfg. Co. v. Landers*, 124 Fed. Rep., 923:

"Any manufacturer has the right to copy an article made by another which is not protected by patent, but he has not the right to so imitate it in shape, design, color and number as to deceive purchasers of average intelligence and cause them to mistake his product for that of the prior manufacturer."

28 A. & E. Enc. (2d Ed.), 410:

"An exact copy of another's trade-mark or name or the dress of his goods is not necessary to constitute infringement or unfair competition. Similarity, not identity, is the test. There is some little confusion in the cases as to the standard to be applied, but the general rule seems to be that infringement or unfair competition exists whenever the resemblance is so close that ordinary purchasers, buying with ordinary caution, are likely to be misled. The resemblance need not be sufficient to deceive experts or persons specifically familiar with the trade-mark or goods involved, nor such as would deceive persons seeing the two trade-marks or articles placed side by side. A similarity sufficient to make it likely that unwary purchasers will be deceived, has been deemed sufficient."

38 Cyc., 779:

"No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is in a measure a law unto itself. Unfair competition is always a question of fact. The question to be determined in every case is whether or not, as a matter of fact the name or mark used by defendant has previously come to indicate and designate plaintiff's goods, or, to state in another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business. The universal test question is whether the public is likely to be deceived."

38 Cyc., 783, 784, 785:

"It is often said that a fraudulent intent on the part of defendant to pass off his goods or business as and for that of

plaintiff is necessary to constitute unfair competition, and infringement of trade-marks has been distinguished upon this ground. But the reasons for not requiring proof of a fraudulent intent in cases of infringement of trade-marks apply equally well to unfair competition cases, for the basis of the remedy is substantially the same in both cases. Unfair competition involves trading upon another's reputation and good will, and the injury is the same regardless of the intent with which it is done. Accordingly the better view is that an actual fraudulent intent need not be shown where the necessary and probable tendency of defendant's conduct is to deceive the public and pass off his goods or business as and for that of plaintiff, especially where only preventive relief against continuance of the wrong is sought or granted. Even if the resemblance is accidental and not intentional, plaintiff is entitled to protection against its injurious results to his trade."

38 Cyc., 789-90-91:

"It is the duty of a subsequent trader coming into an established trade not to dress up his goods or market them in such a way as to cause confusion between his goods or business and that of a prior trader. Even conceding that the later trader has an equal abstract right to use particular words, names or marks, yet if his unexplained use of them will cause confusion and deception, he must accompany such use with affirmative distinguishing features sufficient to render deception improbable. This rule applies to all classes of names, including descriptive, generic, personal and geographical names, which, although primarily *publici juris*, have acquired a secondary meaning. Where a name has acquired a secondary meaning and come to indicate the source of particular articles, the mere use of such a name by another, unaccompanied by adequate distinguishing statements, in itself amounts to an artifice calculated and intended to deceive, and constitutes unfair competition.

"It is a question of fact in each case whether or not the goods or business of the subsequent trader have been so distinguished as to prevent any actual or probable confusion and deception. All the circumstances of the particular case must be considered. It is presumed that the public uses its senses and takes note of differences which are thus disclosed. But on the other hand it must be remembered that similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another so that the mere existence of differences does not necessarily show honest and sufficient differentiation. A nice

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discrimination is not to be expected from the ordinary purchaser. Although differences between the respective labels and packages exist, and are readily apparent upon comparison, yet if the ordinary purchaser is liable to be deceived by the similarities which also exist, an injunction will be granted. Where the distinctive part of a name or mark is taken, minor differences afford no defense. Similarity in the main distinguishing features will usually be sufficient to constitute infringement or unfair competition."

While the subject of trade-names and unfair competition is not altogether new, it has not arisen as frequently in the courts of Ohio as in those of many other states, yet in the federal courts and in England the cases are numerous and the doctrine has become well settled.

In our Supreme Court it was considered in *Brill v. Singer Mfg. Co.*, 41 O. S., 127, where the court found the facts did not make out a case of unfair competition. In the later case of *Drake Medicine Co. v. Glessner*, 68 O. S., 337, the question is well considered, and the opinion by Davis, J., shows that the law of Ohio in regard to this subject is in accord with that of the federal courts and the other states. This case upheld the rule that if the simulation is clearly shown, positive proof of fraudulent intent is not required, but may be presumed; that if the similarity be such that persons exercising ordinary caution are liable to be misled into purchasing one article when they intended to purchase the other an injunction will be allowed.

The case of *French Bros. Dairy Co. v. Giacini*, decided by the court of this circuit, reported in 12 O.C.(N.S.), 134, affirming the lower court decision found in 8 N.P.(N.S.), 549, involves this doctrine. It was affirmed by the Supreme Court without report, 84 O. S., 483.

The following nisi prius decisions also discuss the subject: *Backus Oil Co. v. Backus Oil & Car Grease Co.*, 5 Bull., 546; *Richardson v. Westjohn*, 6 Bull., 233; *Cohn v. Kahn*, 8 Bull., 154; *Lloyd v. Merrell Chemical Co.*, 25 Bull., 319; *Reeder v. Brodt*, 6 O. D., 248; *Feder v. Brundo*, 8 O. D., 179; *Cincinnati Vici Shoe Co. v. Cincinnati Shoe Co.*, 8 O. D., 579; *Ironside v. Ironside Chemical Co.*, 14 O. D., 193.

It is not necessary to refer at length to the numerous cases cited by plaintiff and defendant. The objection made by defendant that many of plaintiff's cases are where a registered trade-mark was being used and therefore did not apply, is not well taken, as the difference between the cases of the registered or technical trade-mark and cases merely of trade-names is in regard to the manner of proof—fraud being presumed in the first class of cases, while it must be proved in the latter class. The existence of infringement or unfair competition as dependent on the sufficiency of the resemblance between the name, ensemble and the goods of the respective parties is a question of fact to be determined upon the evidence in each particular case.

It is determined by this court that the court below committed error in finding for the defendant and in entering a decree dismissing plaintiff's petition.

The judgment is therefore reversed and a decree will be entered in this court granting the injunction as prayed for in plaintiff's petition.

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Summit County.

**PROSECUTION FOR EXCESSIVELY PUNISHING A CHILD.**

Circuit Court of Summit County.

**HARVEY MOHR V. STATE OF OHIO.**

Decided, October 8, 1908.

*Criminal Law—Cruelly Punishing Child.*

In a prosecution under Section 6984a, Revised Statutes, against a father for cruelly and unlawfully punishing his child, it is not proper to charge the jury that the father is the judge as to the mode and severity of the punishment and can not be found guilty for error in judgment, even if the punishment was excessive, nor unless the jury should find he was prompted by malice and ill-will toward the child.

*W. R. Talbot, for plaintiff.**H. M. Hagelbarger, contra.*

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This is an action wherein the plaintiff in error seeks to have this court set aside the judgment of the court of common pleas in affirming the judgment of a justice of the peace, where this defendant was found guilty upon a charge made under Section 6984a, of the Revised Statutes, which section reads as follows:

“Whoever tortures, torments, cruelly or unlawfully punishes, or willfully, and negligently deprives of necessary clothing, food, or shelter, any person, or whoever having the control of, or being the parent or guardian of any child or children under the age of sixteen years, willfully abandons such child or children, or willfully, unlawfully or negligently fails to furnish necessary and proper food, clothing or shelter for such child or children shall be fined not more than two hundred dollars nor less than ten dollars, or imprisoned for not more than six months or both.”

The charge in this case was that on the 7th of June, 1907, Mohr cruelly and unlawfully punished his little daughter. The evidence shows that he punished his daughter, who was seven years old, on the 7th day of June, 1907; that he struck her

several times—it is uncertain how many times—with a strap. He says that the strap which is attached to the bill of exceptions is the strap with which he punished her. There is testimony to the effect that it was a part of a tug of a harness, but perhaps the weight of the evidence would bring one to the conclusion that it was this strap, which evidently has been used sometimes as a razor strap, and which he says he kept in a drawer for the purpose of using it as a razor strap, and for such other purposes as he might want to use it for. He was asked several times what those purposes were, and he said, any purpose that he might want to use it for, and finally admits he used it sometimes to punish his children with. On the 15th of June Mohr was arrested, and on that day Mr. Scuphlon, who is I believe the health officer in Cuyahoga Falls, and Mr. Weber, who is humane officer of this city, saw the girl and found that there were marks upon her person, black and blue, as they expressed it, at that time, eight days after the punishment. And Weber and Mrs. Richards, the housekeeper of Mohr, found that on the 22d day of June, when the trial was had, the marks were still visible, but they were pretty nearly gone at that time. The child, right after the punishment, dressed herself and played around as before. She cried some at the time of the punishment.

From the evidence we think the jury might well have found that the punishment was cruel. But it is said that the court erred in its charge to the jury and erred in refusing to charge as requested, and for these errors it is said the judgment should be reversed. The court charged the jury in a most praiseworthy way, by saying that he would not take a great deal of time in charging them, but that he would charge them, and he said:

“A parent or guardian of a child is undoubtedly the judge as to when and how a child should be punished, so long as that punishment does not conflict with the law, but when it goes to such an extent that it does conflict with the law then that parent or guardian is just as guilty as though it was some one else who was punishing that child.”

The proposition can not be denied that if the father went beyond the law he was doing that which was unlawful. But the

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court then read the section of the statute which has already been read. He read that to the jury, so that he was as definite in saying to the jury what would constitute an unlawful punishment as the statute is definite. The language of the statute is:

"Whoever cruelly or unlawfully punishes a child," etc. The court then says, after reading the section: "Now as to the facts that have been brought out before you here, gentlemen, you are to decide upon them. I have no wish to say a word concerning the evidence, and I believe that you all understand from what I have said and what you have heard here what the law is upon this subject. I have prepared the two regular forms of verdict here," etc.

Now, he was requested to give in charge certain propositions, which he refused, and it is urged that it was erroneous to refuse these. The first is:

"The father was the judge as to the mode and severity of the punishment, and for error of judgment, if you find there was error of judgment in punishing his minor daughter, Edith Mohr, the defendant can not be found guilty, even though you should find that the punishment was excessive."

That ought not to have been given in those words, no difference how excessive you find that punishment to be, if the father, in his judgment, thought it was not excessive, you, gentlemen of the jury, have no right to say whether it is excessive. If that had been given and if this father had amputated a finger of that child, cut off a hand of that child so she should never be able to write anything, if, in his judgment, that was the right punishment, then in such case as that, if the father were prosecuted and this charge were given and the jury had accepted it as the law in the case, the father would have had to be returned not guilty. The proposition has some merit to it. It is true the father is the judge, and the court said to the jury that the father is the judge of when he shall punish and for what, and in order that the father may have the authority that it is conceded by the law, at least, that he may have, he must have the authority to judge, but if his judgment warrants a punishment that is shocking to every right thinking man, he is not to be excused,

even though it was an error of judgment on his part; that is to say, the punishment may be so excessive that even though it is an error of judgment and results from that, that it is cruel and the father is liable to punishment.

The second and third propositions are:

“Before you can find the defendant guilty under this affidavit you must find that defendant was prompted by malice and ill will toward his minor daughter, Edith Mohr, in inflicting the punishment in question.”

That is the way the second reads, and the third is practically the same. If those propositions had been given and accepted by the jury, they must have found the father not guilty, even though he had punished the child severely because of ill-will that he had to the child's mother or sister or brother. There are men who, for the sake of punishing the mother, and having no ill-will to the child, will excessively punish the child. The fact that a parent has no ill-will to the child won't excuse him from a cruel punishment—so cruel as to be clearly shocking to the sense of right thinking men. An authority was cited to us from the state of North Carolina, and some other authority, going to the very extreme and justifying these charges. We find that they have been criticized, and, we feel justly criticized, and though a good many things were hinted at in this record that might be calculated to induce the jury to think this father was a much more wicked man than he was, which facts were not at all established, still there was no admission of evidence which was objected to that constituted any error, and the judgment is affirmed.

It is questionable perhaps whether it was wise to prosecute it, but we find no error which would justify a reversal.

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**OBSTRUCTION OF A COUNTY DITCH.**

Circuit Court of Summit County.

STATE OF OHIO, EX REL WILLIAM P. IRISH ET AL, V. LINCOLN H. OVIATT ET AL.\*

Decided, October 8, 1908.

*Mandamus—Water-Course—Ditch—County Commissioners.*

A writ of mandamus will not issue against the county commissioners commanding them to remove an obstruction placed by a property owner in a water-course along the course of which said commissioners had constructed a ditch, because the commissioners in the first instance had no right to convert the water-course, a living stream, into a ditch.

*Koker & Mottinger and Mr. Andrews, for plaintiffs in error.  
H. M. Hagelbarger, contra.*

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This is an action in mandamus. We have before us the question of whether the petition on its face states facts authorizing the issuance of an alternative writ of mandamus.

The petition alleges that in 1890 the board of commissioners of the county, by proper proceedings, established and constructed a ditch about eleven miles long at an expense set at \$30,000, paid by assessment on the lands benefitted by such ditch; that the ditch extended from Chockalog pond, in Copley township, to a point in the Tuscarawas river, near the village of Barberton. And it further says that this ditch was established and constructed along the course of a stream known as Wolf creek for this whole distance; that it has been used all these years for draining adjacent land, whereby such lands have been converted from swamp and marsh lands to good agricultural lands; that on the faith that said ditch would remain open and unobstructed, the property owners along its line have constructed

\*Affirmed without opinion; see journal entry, *State, ex rel, v. Oviatt*, 83 Ohio State, 460.

at large expense lateral ditches in and upon their several holdings whereby drainage of their lands is had into said ditch. The Columbia Chemical Company has lands near the mouth of the ditch, through which it runs. For the purpose of utilizing the water from this ditch for its manufacturing plant, the chemical company has constructed a dam across the ditch, obstructing the flow of water, setting the same back along the channel and adjacent lands, and has diverted the ditch from its original channel and constructed a circuitous channel, which interferes with the flow and causes great injury to relators and those similarly situated. The relators gave notice to the chemical company to remove said dam, and after waiting more than ten days, they, by motion, called upon the commissioners to cause said dam to be removed, together with all obstructions, and that the ditch be restored to its former state. The commissioners have refused to do this, and the prayer of the petition is that a writ of mandamus be issued to compel the commissioners to remove the dam and restore the ditch to its original state.

The authority under which the commissioners assumed to act in establishing and constructing the ditch is found in Section 4447, Revised Statutes, which reads as follows:

"The commissioners of any county at any regular or called session may, in the manner provided in this chapter, when the same is necessary to drain any lots, lands, public or corporate road or railroad, and will be conducive to public health, convenience and welfare, cause to be located, and constructed, straightened, widened, altered, deepened, boxed or tiled, any ditch, drain or water-course, or box or tile any portion thereof or cause the channel of all or any part of any river, creek or run within such county to be improved by straightening, widening deepening or changing the same, or by removing from adjacent lands any timber, brush, trees or other substances liable to form obstruction therein."

The provision of law under which it is urged the commissioners should act is in Section 4509, Revised Statutes, which reads:

"Whoever obstructs any ditch, or refuses or neglects to remove any obstruction heretofore by such person or persons placed in the ditch, or being the owner of any lands through which any ditch passes, obstructs or permits such ditch to become ob-

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structed, or diverts the water from its proper channel, shall forfeit and pay to the county in which such ditch is situated, the sum of twenty-five dollars to be recovered before a justice of the peace or other court having jurisdiction of the matter, in the name of the state of Ohio for the use of said county, which action may be instituted and prosecuted by the commissioners of such county, or any citizen thereof, or by any person whose lands shall have been assessed for the construction of such ditch and shall also be liable for all damages that may accrue to any person, persons or corporation by reason of such obstruction, and each day that such obstruction shall be permitted to remain in such ditch after the person or persons have placed the same therein shall have had ten days notice to remove the same, either by the county commissioners of said county, the engineer in charge of said ditch, or by any person whose lands have been assessed for the construction or improvement of such ditch, shall constitute a separate offense under this section, and shall subject such offender to a penalty of twenty-five dollars for each such offense, to be recovered in the manner hereinabove provided. And on failure of such person or persons to remove such obstructions forthwith upon being notified as aforesaid it shall be the duty of the board of county commissioners of such county forthwith to cause such obstructions to be removed, and charge the expense thereof to such person or persons, and collect the same from such person or persons by action in the name of said board of county commissioners."

Assuming for the time being, that mandamus is the proper remedy in case of obstruction of ditches, we consider the question of whether the water-course involved in this litigation is such a one as the commissioners are required to remove obstructions from. If it is, we apprehend it is because it is such as they were authorized to construct under Section 4447, Revised Statutes, already quoted. This section is the first in Title VI, Chapter 1, of the Revised Statutes, that being the chapter whose subject is county ditches. In the several sections of this chapter the words "ditch, drain or water-course" are used together in a number of instances, and the Supreme Court of the state, in *Commissioners of Greene County v. Harbine*, 74 O. S., 318, has said, in the syllabus:

"The word 'water-course,' as used in the county ditch law, Title VI, Chapter 1, Revised Statutes, is synonymous with the

word 'drain' and the county commissioners are without authority to convert a living stream of water into a ditch by proceedings for the locating and constructing of a ditch."

Without stopping here to read further, we reach the conclusion, from the case to which attention has just been called (and from the opinion as well as the syllabus), that because this work was done as alleged in the petition, "along the course of a stream," it is not and never was a ditch in the sense in which that word is used in the statute; wherefore, it is not a part of the duty of the commissioners to remove the dam therefrom under Section 4509 already quoted.

It is urged, however, that the commissioners are estopped from making this defense. This we regard as unsound. It is true that the petition shows that the work was done by the board of commissioners and was paid for by the property owners, and until lately, when it has been obstructed by the dam, it has been kept open. It does not follow that the commissioners may take upon themselves to interfere with riparian rights of those owning lands upon a stream, and they are required to perform an act, which, so far as appears, they have never before been asked to perform.

It does not follow that the relators are without a remedy for any injuries they have sustained because the commissioners refuse to do that which we are asked to compel them to do.

No opinion is here expressed as to whether mandamus is the proper remedy when commissioners fail to remove obstructions from a ditch, since we find this is not a ditch in the sense in which that word is used in the statute.

It follows from what has been said that we must refuse the alternative writ, and the petition is dismissed.

**AS TO WHETHER THE GIFT OF A HORSE WAS COMPLETE.**

Circuit Court of Medina County.

**WARREN J. ANDERSON v. IDA M. ALLEN.**

Decided, 1908.

*Gift—Evidence—Incompetent Answer to Competent Question.*

1. A father said to the husband of his daughter Ida: "Go up to the home place, get the little horse I gave Ida, take it off my land up there and turn it on the land I have given her, with your horses." This the son-in-law did the next day. *Held*: A completed gift.
2. Objection to an incompetent answer to a competent question is saved by asking that the answer be taken from the consideration of the jury and not by objection to the question.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Suit was brought by Ida M. Allen in replevin before the mayor of the village of Medina in said county against Warren J. Anderson, to recover a certain horse, then in the possession of Anderson, which plaintiff claimed belonged to her. After trial before the mayor the case was appealed to the court of common pleas and was there tried; the result being a verdict and judgment that the horse was the property of said Allen. Error is prosecuted here to reverse the judgment of said last named court.

A bill of exceptions is filed here, giving all the evidence which was produced and offered on the trial. From this it appears that the horse in question was formerly owned by one Abial Canfield, who was the father of said Allen; and that said Canfield died on the 8th day of April, 1905.

The claim of ownership of the horse made by Allen is that, previous to the death of her father, he made a gift to her of this horse.

On the part of Anderson the claim is made that he owns the horse by purchase from Charles and Albert Canfield, sons of the said Abial.

It is claimed that Abial had given the horse to these two sons, while he was still living, and if that should not be found to be true, then by the provisions of the will of Abial, he having died testate, the horse was bequeathed to them.

An examination of the will of Abial Canfield discloses that, after making devises and bequests to his several children and a grandson, the residue of his property is bequeathed to these two sons. Without expressing any opinion as to whether, under this residuary clause, the ownership of this horse would pass directly to Charles and Albert without administration, it is sufficient to say that, if Abial Canfield owned the horse at the time of his death, Ida M. Allen was not entitled to recover in this action. It is not necessary that Anderson show a good title in the horse which was in his possession when the suit was begun, but only to show that Allen had not title. A claim on the part of Anderson is that the horse, by reason of a gift to Charles and Albert made by Abial, before any gift was attempted to be made by him to Ida, belonged to them, and so she acquired no ownership in the horse, whatever her father said to her about it. That is, that when it is claimed he gave the horse to Ida it was not his to give, as he had already given it to Charles and Albert.

The evidence fails to show a completed gift to Charles and Albert. Charles says his father said he made a will, and that what he had given to him (Charles) and Albert was undivided, and that he was going to turn over all that was to go to them, at once, and that, in speaking of the horse he said "I will give you three horses; the work team I reserve the use of them for Unial Crow until after haying \* \* \* the little bay horse" (the one whose ownership is involved in this case) "I do not want you to sell as long as I can drive him and then you can do as you wish with him."

He states that thereafter he used the horse some, and when he used it he kept it at his place, and that his father used him a part of the time, when he was kept at his father's place. The testimony of Albert as to this gift is not stronger than that of Charles, and from the testimony of neither does it appear that either of them took possession as against the father.

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*Thornton on Gifts* says, at Section 131:

"In all gifts a delivery of the thing given is essential to their validity, for although every other step be taken that is essential to the validity of a gift, if there is no delivery the gift must fail."

Section 142, of the same work, reads:

"A gift to be valid must not only be delivered, but the delivery must be unconditional; it must be delivered absolutely and unconditionally."

Under these rules, as already said, we can not find that the father gave the horse to Albert and Charles. On the other hand, the evidence is such that the jury might have found that he made a completed gift to his daughter, Ida.

She says he said to her, the evening after he had made his will, speaking of this horse, "I have given that to you." She says that at another time, later on, it being her birthday he said to her "I will give you that little driving horse today as your birthday present." He did not, however, on either of these occasions, deliver possession of the horse to her, and so there was up to this time no completed gift to her.

Dr. D. R. Allen, the husband of Ida, testified however, that on the 29th of March, 1905, shortly before Mr. Canfield's death, he said to the witness "Go up to the home place, get the little horse I gave Ida, take it off of my land up there and turn it on the land I have given her, with your horses." He says that, pursuant to this instruction, he went the next morning and got the horse and turned it into the field on Ida's premises, where it remained until after Mr. Canfield's death. If the jury believed this testimony, they might well find a completed gift of the horse in Ida, and so we could not reverse the case on the weight of the evidence.

*Thornton on Gifts*, Section 143, uses this language:

"It is not essential that a delivery be made at the time the words of gift are used," or, in other words, "at the time the gift is made; the delivery may follow at any time before the death of the donor and before he revokes the gift."

It is urged that the court erred in overruling the objection made to a question put on behalf of Mrs. Allen, to Walter Canfield when he was upon the witness stand. This witness was the assessor in 1904, and called upon Abial Canfield to list his property for taxation, and stated that he had a conversation with him about his property at the time. He was then asked this question: "What did he say?"

This question was objected to on behalf of Anderson; the objection was overruled and exception taken. If any answer which the witness might give in response to this would be competent, then no error was made in the ruling. It was rightly held by the court several times during the trial that statements made by Abial Canfield as to what he intended to do with his property was competent as tending to show the probability or improbability of his giving it to any particular person. The witness might have answered this question, that he said he was going to give the horse to Ida, or to Charles and Albert; that answer would have been competent and would have been directly responsive to the question. It follows that the court properly overruled the objection. If it was desired to have the answer which was given taken from the jury, a motion to that effect should have been made; this was not done.

A similar question is made as to a question asked and answered by Howard Jones, when he was upon the witness stand, and, for the same reason, there was no error in the ruling of the court.

Without pausing to call special attention to other alleged errors, a careful examination of the entire record discloses no error to the prejudice of the plaintiff in error and the judgment is affirmed.

No penalty will be adjudged against the plaintiff in error.

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Mahoning County.

**COMPENSATION TO DEPUTY STATE SUPERVISORS  
OF ELECTION.**

Court of Appeals for Mahoning County.

**STATE OF OHIO, ON RELATION OF JOSEPH E. JONES, v. I. M. HOGG,  
COUNTY AUDITOR.**

Decided, December 12, 1913.

*Elections—Previous Provisions of the Statutes as to Pay of Deputy  
State Supervisors—Not Affected by the Constitutional Amendments.*

Provisions of Section 4900 of the General Code are not inconsistent with Article V, Section 7, of the amendments of 1912 to the Constitution, and by the provisions of that section of the statutes each member of the board of deputy state supervisors of elections is entitled to receive, as compensation for his services in conducting a primary election provided for by Section 4963 of the General Code, to be held in September of odd numbered years, the sum of \$2 for each precinct in his county whether primary elections were actually held in all of the precincts of his county or not.

*David G. Jenkins*, for relator.*A. M. Henderson*, Prosecuting Attorney, contra.

NORRIS, J.; POLLOCK, J., and METCALFE, J., concur.

The relator in his petition alleges that on the 2d day of August, 1912, he was duly appointed a member of the board of deputy state supervisors of elections for Mahoning county, for a term of two years; that on the 2d day of September, 1913, a primary election was held in Mahoning county, in accordance with law, and that the relator acted as member of such board of deputy state supervisors of elections in conducting said primary election; that on the day of such primary election there were 133 legally existing and constituted election precincts in said county, and that he was entitled, as compensation for his services in conducting such election, to the sum of \$266, but that the defendant, I. M. Hogg, auditor of Mahoning county, refused to issue his warrant for such sum, claiming that relator was entitled to only \$194 as the legal compensation; that relator has presented proper certificate and voucher and in all things com-

plied with the requirements of the law, and that there is money in the county treasurer's hands to the credit of the proper fund to pay the full amount of relator's claim for compensation.

It is nowhere alleged in the petition that primary elections were actually held in all of the 133 precincts of the county. To this petition a demurrer was filed by the respondent on the ground that the petition did not state facts sufficient to constitute a cause of action and the issue of writ of mandamus prayed for.

It is stated by counsel that while there are 133 election precincts in the county, 89 are in the city of Youngstown and 44 in townships outside of Youngstown, and it is said that the auditor refused to issue the warrant because of the provisions of Article V, Section 7, of the amendments to the Constitution adopted in September, 1912, which provides that:

"All nominations for elective state, district, county, and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States Senator, but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality."

Is it necessary for the relator to allege in his petition that primary elections were actually held in all of 133 precincts? Section 4990 of the General Code provides as follows:

"For their services in conducting primary elections members of the board of deputy state supervisors shall each receive for his services the sum of \$2 for each election precinct in his respective county."

This simply seems to be the method of fixing the compensation of these officers. It is a means clearly to express the legislative intent. We see no reason for giving it any interpretation other than what the plain language implies—that is that each such deputy state supervisor shall receive \$2 for each precinct, and this without reference to whether elections were held in all of the precincts or not.

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The election for which compensation is asked in this case was a general primary election held under the provisions of Section 4963, which provides that:

"Primaries held to nominate candidates for township and municipal offices, justice of the peace, and members of the board of education, shall be held in each county at the usual polling places, on the first Tuesday after the first Monday in September in odd numbered years."

, 111 :

Now, the provisions of the section of the Constitution we have quoted above, provided that in townships outside of municipalities such primary elections shall not be held unless petitioned for. Whether such primaries are petitioned for in this case does not appear, but is this Section 4990, at all inconsistent with that provision of the Constitution which merely provides a method of determining compensation of the supervisors for holding such general primaries? The constitutional amendment may possibly reduce the amount of services to be rendered, but does that necessarily change the provisions of the statute as to the compensation? We think not.

The schedule adopted September, 1912, provides:

"The several amendments passed and submitted by this convention when adopted at the election shall take effect on the first day of January, 1913, except as otherwise specifically provided by the schedule attached to any of such amendments. All laws then in force, not inconsistent therewith shall continue in force until amended or repealed."

Without this constitutional amendment there could be no doubt as to the proper interpretation of this statute. How can it be said that this amendment amends the statute or gives it any different interpretation than it had before? As we have said, we think this statute is not inconsistent with the amendment and remains in full force and should receive the same interpretation as it had before the amendment was adopted. A peremptory writ of mandamus will be awarded as prayed for.

**— (PENALTY FOR SALE OF LIQUOR ON SUNDAY.**

Circuit Court of Lorain County.

**CITY OF LORAIN V. JAMES MARALDI.\***

Decided, June 18, 1909.

*Liquor Laws—Municipal Ordinance—Not in Conflict With State Law—Penalty.*

A municipality under power granted by Section 1536-100, Sub-Section 5, Revised Statutes, to regulate ale, beer, porter houses and shops and the sale of intoxicating liquors as a beverage, may enact a valid ordinance prohibiting the sale of intoxicating liquor on Sunday and making the penalty therefor not exceeding \$500 and not less than \$100, for a first offense, though the state law on the same subject makes the penalty not exceeding \$100 and not less than \$25 for the first offense.

*S. H. Williams, J. F. Strenick and F. M. Stevens, for plaintiff in error.*

*Geo. L. Glitsch and C. F. Adams, contra.*

**MARVIN, J.; WINCH, J., and HENRY, J., concur.**

The first question to which attention is called is as to the validity of the ordinance of the city of Lorain, under which the defendant in error was prosecuted. This ordinance we hold to be valid and within the authority conferred upon the council by Section 1536-100, sub-section 5 of the Revised Statutes, which, speaking of the powers conferred upon municipalities, reads:

“To regulate ale, beer, porter houses and shops, and the sale of intoxicating liquors as a beverage. But nothing in this act shall be construed to amend, repeal or in any way affect the provisions of an act entitled, ‘An act to amend Section 4364-20 of the Revised Statutes of Ohio.’ ”

The section referred to provides for the punishment of those selling liquor on Sunday, and that such penalty shall be a fine

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\*Affirmed by the Supreme Court without opinion, *Maraldi v. City of Lorain*, 81 Ohio State, 539.

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not exceeding \$100 and not less than \$25, for the first offense, whereas, the ordinance under which this prosecution was held, provides for a penalty for the first offense of a fine not exceeding \$500 and not less than \$100. This makes the penalty for the violation of the ordinance greater than the penalty provided for the violation of the statute, but does not, as we understand it, in any wise affect the statute. One may be prosecuted who commits the offense either under the statute or under the ordinance. The two prosecutions are distinct and separate, as appears by the case of *Koch v. State*, 53 Ohio St., 433, the syllabus of which reads:

"A former conviction before a mayor for the violation of an ordinance is not a bar to the prosecution of an information charging the same act as a violation of a statute."

It is said, however, that the ordinance is against the policy of the statute, as shown by the statute and by the penalties here provided for the offense charged against the defendant in error, and we are cited to the case of *City of Canton v. Nist*, 9 Ohio St., 439; *Thompson v. The City of Mt. Vernon*, 11 Ohio St., 688.

The argument drawn from these cases seems to us to be fully answered by the case of *Burckholter v. McConnelsville*, 20 Ohio St., 308.

In that case an ordinance of the village of McConnelsville prohibiting the keeping of a place of business "where ale, porter or beer is habitually sold, or furnished to be drunk, in, upon or about the house, where so sold or furnished."

It was urged in that case that this was contrary to the policy of the statute because the statute providing against the keeping of drinking places, used the words, "shall not extend to the wine manufactured of the grape cultivated in the state, or beer, ale or cider." Speaking of this, the court say:

"It is argued that this general statute impliedly legalizes the sale of pure Ohio wine manufactured of the pure juice of the grape cultivated in this state, or beer, ale, or cider; and that a municipal ordinance prohibiting their sale is against the policy of this statute and therefore void."

After discussing this claim, the court say:

“And it is no ground of objection to the validity of prohibitory ordinances, thus authorized, that the general laws of the state do not extend the prohibition to all parts of the state. Morality and good order, the public convenience and welfare, may require many regulations in crowded cities and towns, which the more sparsely settled portions of the country would find unnecessary.”

So, too, it may well be that in municipalities where there is a congested population more severe penalties are necessary and proper to secure an observance of the law, than are necessary where the population is sparse and the sales comparatively few. What might be a very severe penalty in the way of a fine to one whose sales are limited to \$2 or \$3 a day might be very light for one whose sales are many times that amount per day; and when the Legislature gave to municipalities the power “to regulate ale, beer, porter houses and shops and the sale of intoxicating liquors as a beverage,” it was presumed that it was done for the purpose of enabling municipalities to make such regulations, and provide such punishment for the violation of such regulations as the municipality might think best. In short, that the municipality might need some legislation different from that needed for the regulation of those places outside of municipalities.

We reach the conclusion, therefore, that the ordinance is valid.

It is said, however, that the evidence does not support the judgment, and that it is so manifestly weak on the part of the prosecution, so that the judgment should be set aside as not supported by sufficient evidence. This position is not sound. The evidence shows that the defendant in error was the proprietor of a saloon; that back of his bar room, with two intervening rooms, there was a kitchen; that in this kitchen customers were served by this defendant with intoxicating liquors; that the rooms connected and customers came into the front door of the saloon, and, by invitation of the defendant in error, passed into this kitchen, where they were served with their drinks. We

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think from this the mayor might well have found that the kitchen was a part of the defendant's establishment, which he kept for the sale of intoxicating drinks.

That the drinks for which the defendant was prosecuted were sold in this kitchen, is not denied. The sale was made by a brother of the defendant. He lived there with the defendant. He was employed as a laborer on the docks, but it is shown that at times prior to the date charged against the defendant in this prosecution, he made sales of drinks at this establishment, and that he also made sales there afterwards. It is said that the court erred in admitting evidence of sales made by the brother after the time charged in the prosecution. We think this evidence was competent, as tending to show that this brother was the agent of the defendant and taken in connection with the evidence that shortly prior to the time charged he made sales there, justified the mayor in coming to the conclusion that in selling the drinks shown to have been sold at the time charged, he was acting as the agent of the defendant.

The result is that the judgment of the court of common pleas is reversed and that of the mayor affirmed.

**PROCEEDINGS FOR RELOCATING A COUNTY ROAD.**

Circuit Court of Lorain County.

**HENRY M. HAGELBARGER, AS PROSECUTING ATTORNEY, v.  
THE PENNSYLVANIA COMPANY.**

Decided, June 18, 1909.

*County Road—Change in Location—Informal Proceedings—Presumption.*

1. Under Section 4661, Revised Statutes, the county commissioners have authority to vacate all or a part of a county road upon the application of "any twelve freeholders residing in that part of the county where such road is established," and where they act upon an application purporting to be so signed, in a collateral proceeding calling in question the regularity of their proceedings, there is no presumption that the twelve signers were not freeholders residing in the vicinity, though the record is silent on the subject.
2. In such case, where part of a road is vacated and a new road actually established and used by the public and the proper authorities, there is a legal change in the location of the road, even though the proceedings of the commissioners may have been informal.

*Grant, Sieber & Mather, for plaintiff in error.*

*Allen, Waters, Young & Andress, contra.*

**MARVIN, J.; WINCH, J., and HENRY, J., concur.**

Under favor of Section 863, Revised Statutes, the plaintiff in his official capacity brought this action in the court of common pleas. The purpose of the action was to obtain an order requiring the defendant, which is a railroad company, to remove fences and obstructions from what the plaintiff claims is a public highway in this county.

The facts are these:

Prior to the year 1888, a public road lead westerly from the north and south Center road, in the township of Hudson, in this county. That road thus running westerly crossed the right-of-way and tracks of the Cleveland & Pittsburg Railroad, a road

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now operated by the defendant. This crossing was diagonal, not at right angles, and the highway at a point about 200 feet westerly from the crossing just mentioned, made an obtuse angle, and lead to the northwest again crossing the track of this railroad at a point about 200 feet westerly from this angle, and then continued on to the west. The point just easterly of the point where the highway made the crossing first mentioned of the railroad tracks, deflected slightly to the south. This point is indicated on a plat shown in the trial as "No. 1."

The point where the second crossing of the track was made is indicated on this plat as "No. 2," and the angle, already mentioned in this highway, is designated on the plat as "No. 3." It will be seen that the distance from No. 1 to No. 2 was somewhat greater by following this highway than it is by drawing a straight line from No. 1 to No. 2. In 1888 the land along the north side of the railroad from No. 1 to No. 2 was owned by one Hiram Bishop, who owned a farm, and this land along the north line of the railroad was a strip along the south side of this farm. On the south side of the railroad the land was then owned by Avery Bishop, a brother of Hiram. Subsequently Avery came to own all the land, that is to say, the farm on the north side as well as on the south side of the railroad. Avery died in ——— and Della Bishop Ingersoll became by inheritance from Avery Bishop the owner of the land, and this suit was brought in her interest in the name of the prosecuting attorney, as authorized by the section of the statute already mentioned. In 1888, the railroad company and the commissioners of Summit county desiring to eliminate these crossings of the road over the railroad, made an arrangement by which a strip of land along the north line of the railroad, the proper width for a public highway, and leading from point No. 1 to point No. 2, was deeded by Hiram Bishop to the commissioners of the county, the consideration paid therefor of \$200 being paid by the railroad company. Thereupon the commissioners resolved, upon the petition of freeholders of the county, to change the line of the highway so that it should run along this land deeded to them by Bishop, and they took possession

of and constructed a road along this strip of land so that the highway as thus changed by the commissioners became a continuous highway from the road as it originally was, leading from the east to and beyond point No. 2, and so on west. The commissioners further resolved not to abandon that part of the old road from point No. 1 to point No. 3, a distance of about 200 feet, as has already been stated. On the southeasterly side of this part not thus abandoned were and are two dwelling-houses. There are no other residences and no places of business along any part of the old road from point No. 1 to point No. 2. It will be seen that by living upon the part of the road, as above described, those occupying these dwelling-houses and those having business with them could reach the road as established by driving this distance of less than 200 feet to the main road. All this having been done, the railroad company placed its fences along the north and south sides of its right-of-way across this part of the old road which made the crossing at point No. 2, and it is for the purpose of having these fences, and such other obstructions as the railroad company have placed along its right-of-way where the road crossed at No. 2, removed, that this suit is brought.

It is urged that the proceedings of the commissioners in attempting to vacate any part of the old road were invalid and that therefore the old road exists as it did prior to 1888, and the defendant is not entitled to obstruct it in any way. It is provided in Section 4661, Revised Statutes of Ohio, that:

“When a county road or part of a county road is considered useless, any twelve freeholders residing in that part of the county where such road is established, may make application agreeably to the provisions of this chapter, to the commissioners of the county to vacate the same and if no objection be made, the commissioners may declare vacated the road or any part thereof which they may deem unnecessary to keep open for public convenience.”

In the adjudications which have been made under this statute, the language of the courts has been, freeholders residing in the “vicinity,” but this word is so used because clearly the word “vicinity” means the same as the language used in the statute,

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that is, they must reside in the part of the county where the road is located. It does not appear in the record of the proceedings of the commissioners that any finding was made by the commissioners that the freeholders who signed the petition resided in the vicinity of this road or in that part of the county in which the road is located, and it is said that no presumption arises in favor of the regularity of the proceedings of the commissioners, but that they can be held to have had only such jurisdiction as affirmatively appears by the record of their proceedings. This claim is based upon the proposition that jurisdiction will not be presumed in favor of inferior judicial tribunals.

By reference to Section 4650, Revised Statutes, it will be seen that the record required to be made up by the commissioners of their acts and proceedings to vacate a public highway, does not include any record of their findings as to the place of residence of the petitioners, so that it is clear that when the commissioners have recorded the petition for the road, together with their orders to the viewers, and the report of the viewers together with the survey and plat, and their order thereon, all the record has been made which the statute contemplates, and this does not include any record of a finding as to the places of residence of the petitioners. We reach the conclusion, therefore, that the position is not well taken that the presumption must be that the petitioners were not residents of the vicinity, and so it was proper at the hearing of this case that evidence of the residence of such petitioners should be taken, and from that evidence, we find the court was justified in holding that the petitioners were residents of that part of the county in which the road was located. But however that may be, there can be no doubt that the new road from point No. 1 to point No. 2 became, by what was done by the commissioners, as has already been pointed out, an established public highway. This is clear from the case of *The City of Steubenville v. Ezra A. Knight*, 23 Ohio St., 610, the first clause of the syllabus of which case reads:

"A conveyance of land to the county commissioners for a county road, the acceptance of such grant by the commissioners,

and opening of the road by their order, and its subsequent use as such by the public, and by the proper authorities, constitute it a legal, public highway, notwithstanding the want of statutory proceedings for its establishment."

By Section 4669 of the Revised Statutes of Ohio, it is provided that, "All alterations of county roads heretofore made and established, or which shall hereafter be made and established, shall be and remain part of such roads, and so much of the original roads as is rendered unnecessary by such alterations in the opinion of the viewers and the county commissioners, shall be and remain vacated."

In the case of *Silverthorne v. Parsons*, 60 Ohio St., 331, this section was considered, and the syllabus of the case reads:

"When the owners of land crossed by a county road enter into an agreement with the county commissioners pursuant to which they convey to the commissioners other land, with a view to affecting a necessary change in the road, and the road is by order of the commissioners opened on the lands conveyed, and is so used by the public and by the proper authorities, there is a legal change in the location of the highway, notwithstanding the want of statutory proceedings for that purpose; and under Section 4669 of the Revised Statutes, so much of the original road as is rendered unnecessary by the change is vacated."

We hold that clearly, from the evidence in this case, so much of the original road as extended from point No. 3 to point No. 2 on the plat already mentioned, was rendered wholly unnecessary by the opening of the road from point No. 1 to point No. 2. That being true, the establishment of the new road resulted in a vacation of this last named part of the old road, and the acts of the defendant in this action in placing fences along either side of their right-of-way, and such other obstructions as they placed within the limits of their right-of-way, did not constitute an obstruction to any public highway, and the judgment of the court dismissing the plaintiff's petition was right, and is affirmed.

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**AS TO USE OF SEWER ACROSS THE LAND OF ANOTHER.**

Circuit Court of Summit County.

GEORGE BATES v. GEORGE W. MAGENNIS.

Decided, October 11, 1909.

*Easement—Sewer—No Record Evidence or Actual Notice.*

The mere existence of a private sewer through a man's land which others are using, but of which there is no record evidence and of which he had no knowledge when he purchased the premises, does not give such others a right to continue the use of said sewer without his consent.

*Slabaugh, Seiberling & Huber, for plaintiff in error.**Otis, Berry & Otis, contra.*

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The plaintiff is the owner of a lot of land in the city of Akron at the corner of Adolph street and Perkins street, the lot fronting on Adolph avenue. The defendant is the owner of a lot fronting on Good street, in the city of Akron. There are several intervening petitioners in this case, and they severally own lots fronting on Adolph avenue (which is a street running south and north), south of the lot owned by the plaintiff. Good street and Adolph avenue are parallel to each other and are about 400 or 500 feet apart. These several lots are all a part of the same allotment made by Jacob Good, and known as "Good's allotment." This allotment was made in 1872 or thereabouts, and is properly recorded in the records of Summit county. At the time the allotment was made Jacob Good owned all this property, together with many other lots in an allotment. There is now and for many years has been a main sewer extending along the line of Good street. There is also a main sewer in Perkins street. There is no such sewer in Adolph avenue. While Good was the owner of all the lots which are affected by the controversy in this case, he constructed a private sewer in and along Adolph avenue, from a point in front of the plaintiff's lot southerly to a

lot known as No. 8, in his allotment, so that it passed along the front of the lots of the intervening petitioners in this case. When it reached lot 8, Good turned it to the west, and carried it across the southerly part of that lot and near the northerly line of the lot owned and held by the defendant Magennis. The lot of the defendant is known as lot No. 21. These lots crossed by this sewer, as well as the lots fronting on Adolph avenue, which were along the line of this sewer, were all owned by Good at the time he put in the sewer, which is a 6-inch pipe sewer. This sewer crosses to the west across the lots of the defendant Magennis and empties into the main sewer on Good street. The defendant, unless enjoined, will obstruct this sewer crossing his premises so as to prevent sewage from the lots in front of which and along which it runs from being discharged into the sewer in Good street, and the purpose of the suit is to enjoin the defendant from so obstructing this sewer. The deeds from Good to the several purchasers of the lots involved in this suit make no mention of this private sewer, nor is there any record of one. The claim of the plaintiff and the others similarly situated is that the inducement to purchase the several lots owned by them was the existence of this private sewer, and it is urged by them that as Good was the owner of all this property, as he sold off the lots he encumbered the remaining lots, that is the lots remaining in his ownership, with this sewer privilege. It is not, however, seriously urged that the defendant Magennis, who purchased his lot in 1906, from J. Ed. Good, who had purchased it from the heirs of Jacob Good, the original proprietor of all these lots, would take his title subject to the right of the other lot owners to have this sewer maintained, unless he had knowledge of the existence of the sewer. Certainly, if this claim had been seriously urged, it could not be maintained. A perfect abstract of the title of this lot No. 21, owned by Magennis, taken from the records accessible, would have given him no notice of any rights of anybody to maintain a sewer across his lot. It was sought on the part of the plaintiff, however, to show that the defendant had actual notice of the existence of this sewer. We do not discuss at all the proposition of what his rights would

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have been, if such actual notice were shown. The only evidence tending to show that he had such notice is the testimony of Mr. Holloway, the acting agent for J. Ed. Good, through whom the defendant negotiated for the purchase of the lot. Holloway says that he said to Magennis that if he should ever want to build a barn on this lot that he thought he would find a sewer already there, and if he wanted to know where that sewer was he had better see J. Ed. Good. Magennis did not remember any such conversation as this; but suppose it took place; supposing Holloway's recollection is right, we hold that it is no such notice to Magennis as should put a careful man upon inquiry to know if there was not a sewer running through his lot which the lot owners on a street entirely away from his lot were entitled to have kept open. It is urged, as evidence, that Magennis must have known about this sewer, because Orgill who built a house for Magennis said something to him about a sewer being through there, and Magennis manifested no surprise about it. This is easily explained by the statement made by Magennis, that some time after he purchased that lot he was told by his wife that a neighbor woman had told her that she believed that there was a sewer across this lot, so that this statement of Orgill was not the first that Magennis ever heard of the sewer. Of course the notice from Orgill coming after the purchase was made, or the notice to Mrs. Magennis, which came after the purchase was made, could not in any way affect Magennis' rights, nor is that claimed, but that only the fact that Magennis did not seem surprised to learn something about a sewer when Orgill spoke about it tends to show that he must have known about it before. So he did to the extent that his wife had told him what the neighbor woman had said. But we hold that the fact, if it be a fact, that Holloway said to Magennis that he thought there was a sewer on the lot through which he could drain from a barn if he might want to erect one on his lot, was not such notice as to charge Magennis with the lien of the easement across this lot for a sewer.

Attention is called to the fact that the sewer connection between Magennis' house and the public sewer on Good street is

made through this sewer. It appears from the evidence that Magennis contracted with a party to put in this sewer connection from his house to the Good street sewer and that the contractor took advantage of the sewer which he found there and made the connection with it. Certainly this can in nowise entitle the plaintiff or the other lot owners on Adolph avenue to have this portion of the sewer kept open. Besides, it is shown that for a sum not exceeding \$450 a sewer can be constructed from the point in this private sewer where it turns from Adolph avenue, to the west and then south, to the main sewer in Forge street.

As to the plaintiff the connection can be made for sewer purposes from his premises to the sewer in Perkins street at no great expense.

We reach the conclusion that the plaintiff and the other property owners have not made a case that clearly entitles them to relief against this defendant, and that it would be inequitable, under the facts here, to encumber the title of the defendant with an easement for this sewer, and the petition of the plaintiff and the several intervening petitioners are dismissed.

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Richland County.

**DAMAGES ON ACCOUNT OF THE BUILDING OF AN INTERURBAN RAILWAY IN FRONT OF PROPERTY.**

Court of Appeals for Richland County.

**THE PLYMOUTH & SHELBY TRACTION COMPANY V. JOHN H. HART.**

Decided, January Term, 1913.

*Abutter—Procedure for Recovery of Damages for the Building of an Interurban Road in Front of Property—Rights of an Abutter in a Street or Road Upon which He has Encroached—Statute of Limitations with Reference to Such Encroachment as Applied to a Railway Company—Charge of Court—Section 8765, General Code.*

1. An abutting owner, who has been damaged by the construction of a railway track in front of his property, may proceed in any proper court for the recovery of such sum from the company as will compensate him for the damages so sustained in so far as his loss can be made good by a money consideration.
2. While the statute of limitations does not run against the state as to encroachment upon one of its roads, it does run against a railway company which seeks, in order to make room for its track, to widen the road to the width at which it was originally laid out, and where the improvements of an abutting owner are removed in so widening the road and laying its track, he may recover compensation therefor.
3. In instructing a jury on the vital issues of a case about to be submitted to them for determination, it is not prejudicial error to so group or summarize the issues that the jury may intelligently understand them.

*Culp & Hines*, for plaintiff in error.

*Skiles, Green & Skiles*, contra.

SHIELDS, J.; VOORHEES, J., and MARRIOTT, J., concur.

This action was commenced in the court of common pleas of this county by John H. Hart, defendant in error, to recover damages against the Plymouth & Shelby Traction Company, plaintiff in error, for injuries to the property of the defendant in error growing out of the location and construction of a street railroad by said company in the incorporated village of Plymouth in said county.

In his amended petition the plaintiff, in substance, avers that he is the owner of out-lot number twenty-four in said village fronting on what is known as the Plymouth and Shelby road in said village; that the defendant owns and operates a line of electric railway extending from the said village of Plymouth to the village of Shelby in Richland county, Ohio; that prior to the construction of said electric railway, plaintiff's said out-lot was on a common grade with said road fronting said out-lot; that in the construction of its said railway, the defendant wrongfully and without authority located its tracks and road-bed on the west side of said road and immediately adjacent to the plaintiff's said land, and wrongfully and unlawfully constructed a grade from four to twelve feet high along the east line of a pasture field north of the south line of plaintiff's said land, thereby rendering it impossible for the plaintiff to enter upon his said land from the said Plymouth and Shelby road; that the defendant wrongfully destroyed the wire fence along said field and along the frontage of the plaintiff's property. and that along and in front of the orchard on the plaintiff's said land the defendant cut a hole some six feet in depth and for a distance of about fifty feet and thereby destroyed several valuable fruit trees of the plaintiff; that the defendant wrongfully entered upon the land of the plaintiff and unlawfully took therefrom a large quantity of ground and appropriated it to its own use, and wrongfully destroyed the fence in front of the plaintiff's garden and constructed a bank about two feet high in front of said garden, thereby throwing the water off of defendant's right-of-way onto said garden; that immediately in front of the plaintiff's house, situate on said out-lot, the defendant constructed a grade some two feet above the established grade of the public street, thereby throwing the water from the road-bed onto the plaintiff's lot and into the plaintiff's cellar, thereby preventing plaintiff from having a convenient means of ingress and egress to and from his property; that directly north of the plaintiff's house and in front of a pasture field having a frontage of two hundred feet, to a certain creek, the defendant wrongfully and without authority tore down plaintiff's fence for a

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distance of some seventy-five feet north of the plaintiff's house to said creek, and constructed a bank upon which its tracks were laid about nine feet high, said bank causing the water from said creek to back up and flow over the lands of the plaintiff, rendering the same untillable; that over said creek the defendant constructed a bridge and wrongfully extended the abutments on the south side thereof onto the plaintiff's land some ten feet, and extended the abutments on the north side thereof onto the plaintiff's land some six feet, and extended all of the right-of-way of the defendant along said frontage over and onto the plaintiff's land some five feet, which said five feet of plaintiff's said land in the construction and laying of its tracks and road-bed the defendant wrongfully appropriated.

By reason of the construction of said grade, the destruction of the plaintiff's fence and fruit trees, the appropriation of the plaintiff's ground, the diversion and obstruction of said water-course, the obstruction of the plaintiff's means of ingress and egress to and from his said premises, the appropriation of plaintiff's land in the construction of said bridge and the use of said plaintiff's land for the defendant's road-bed, as aforesaid, the plaintiff prays judgment against the defendant for twenty-five hundred dollars.

In its answer to the foregoing amended petition of the plaintiff, the defendant admits its corporate character, and that it is operating an electric railway as alleged in said amended petition; it admits that the land in dispute abuts upon the road leading from Plymouth to Shelby, that said lands are within the incorporated village of Plymouth, and that it has constructed its railway along the west side of said Plymouth and Shelby road, but it denies each and every other allegation therein.

For its further answer and cross-petition the defendant says that prior to the time of its constructing and building said railroad or operating its said cars, it obtained from the council of the village of Plymouth, Richland and Huron counties, Ohio, a franchise to locate and construct its electric railway upon and along the street of said village described in said petition, and being the street abutting upon plaintiff's east line of said

premises described in plaintiff's petition; that said railroad was constructed and is being operated under and by virtue of the right granted to this defendant company by said franchise so passed and granted to this company by the council of Plymouth, Richland and Huron counties, Ohio, and that the plaintiff herein signed a written application, consent and request to the council of the village of Plymouth to grant to said defendant company the right and privilege to construct, build and maintain said electric railway, as the same is now constructed and operated on the street abutting on plaintiff's premises, and by reason of the facts herein alleged, the defendant asks that plaintiff's petition may be dismissed.

To the defendant's answer the plaintiff filed a reply in which it denies each and every affirmative allegation contained in said answer.

Under the issues made by these pleadings the cause was submitted to a jury resulting in a verdict for the plaintiff. A motion for a new trial was overruled and judgment entered on the verdict. A bill of exceptions was taken embodying the evidence introduced upon the trial, including the charge of the court, and said cause is now in this court upon a petition in error for review. Numerous grounds of alleged error are assigned in said petition in error for the reversal of the judgment of the court of common pleas, but the plaintiff in error urged upon this court and relied principally upon the following grounds of alleged error, namely:

First, that the court below erred in overruling the motion of the defendant below to require the plaintiff below to separately state and number the causes of action in his petition.

Second, that the court below erred in admitting any evidence upon the trial of said cause under the amended petition of the plaintiff.

Third, that the court erred in its charge to the jury.

As to the action of the court below in overruling said motion of the defendant in error to said amended petition, we are of the opinion that said court did not err, there being but one cause of action stated in said amended petition.

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Exception is taken to the action of the court below in overruling the objection of the plaintiff in error to the introduction of any evidence upon the part of the defendant in error in support of the averments in his amended petition, the claim being made that if the defendant in error has a cause of action upon which he is entitled to recover damages for any of the injuries complained of, his remedy was under the provisions of Section 6448, Revised Statutes, and not under the provisions of Section 3283, Revised Statutes.

As we view it, Section 3283 was enacted by the Legislature in the interest of abutting property owners for their protection. It contemplates that when a railroad company injures an abutting property owner in his private property rights, by the location and construction of its track or tracks upon the street upon which such property abuts, such company shall respond in damages for such injuries and in such sum as will compensate him for the damages suffered, in so far as his loss can be repaired by a money consideration in restoring to him what he has lost through the location and construction of such railroad.

This statute provides that—

“Every company which lays a track upon any such street  
• • • shall be responsible for injuries done thereby to private or public property lying upon or near to such ground.”

We think the language here used is capable of but one construction and must be taken to mean what it plainly says, namely, that the railroad company shall be held responsible for all injuries of every description done to the abutting property owner in the location and construction of its track and road. We do not think that the injured abutter is required to go into the probate court and institute proceedings in that court as provided in Section 6448, Revised Statutes, for the recovery of damages for injuries so done to private property and property rights as are set out in the amended petition, but that a remedy is provided for the redress of such alleged wrong in said Section 3283, Revised Statutes. Hence we are of the opinion that the objection of the plaintiff in error at the outset of the trial of this case to the admission of evidence under

said amended petition was properly overruled by the court and that such action of said court affords no ground of error. 45 O. S., 309-318; 12 Ohio Law Bull., 214.

It appears that a franchise was granted to this street railway company by the council of the village of Plymouth to locate its track upon the east side of what is known as the Plymouth and Shelby road, now a street within the corporate limits of said village, fronting the premises of the defendant in error, and that the council of said village by resolution afterward authorized said company to locate its road on the west side of said street. That said street in front of and along said premises was laid out and originally intended as a public highway to be sixty feet wide and that the plaintiff in error in laying its said track upon the west side of said street found it necessary to widen the same to the full width of sixty feet, the standard width of a state road (said street being then about forty or forty-five feet wide), and in so doing the defendant in error claims that said company removed and destroyed the fence in front of his said premises, and also removed and destroyed several valuable trees growing in his orchard, included in the strip of land enclosed by said fence and which has been so enclosed and occupied by the defendant in error for a period of twenty-five years or more. That said company also erected an embankment along the full length of the premises of the defendant in error, thus raising the grade of said street without authority and in violation of the terms of the franchise granted to said railroad company by said village council, thus destroying the easement to certain portions of the property of the defendant in error, and especially interfering with his right of ingress and egress to and from his property, and by unlawfully turning the surface water onto his premises and into his cellar and otherwise interfering with his private property rights. It appears that said company acted upon the assumption that it had the legal right to appropriate to its use the property occupied and enjoyed by the defendant in error, for the time stated, described as a part of his orchard and the trees growing thereon, in widening said street to what is claimed

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to be sixty feet to accommodate the location of its road-bed and track. Whatever the width of said street, if it was less in width than what it was originally laid out and designed to be as a state road by the authorities, and whatever the length of time the defendant in error may have occupied it with his fence and orchard by encroaching upon any part of such sixty feet while a state road, the state through its properly constituted authorities might have asserted its right to such part of said road occupied by said fence and orchard, as aforesaid, if it had seen fit to do so, because the statute of limitations would not run against the state, but the state could not delegate this attribute of sovereignty to said village which, after its incorporation as such, succeeded by operation of law to the exercise of jurisdiction over so much of said road as was included within the corporate limits of such village and against which the statute of limitations would run. 56 O. S., 175-179-180; 49 O. S., 98.

And if said company in so widening said street or road removed and destroyed said fence and growing trees in the orchard west of it belonging to the defendant in error, it is liable in damages for such removal and destruction. In other words, the act of said village in causing said street or road to be widened to what is claimed to be the standard width would be lawful, while the act of said company in so widening said street would be wrongful, entailing upon it the consequences of such wrongful act. Hence, we think it was proper for the court below to submit to the jury, as was done, the various elements of damages claimed to have resulted from the widening of this street or road by said company, by the location and construction of its road-bed and track as aforesaid, and it was the province of the jury to determine the amount of such damages in the light of the evidence tending to show the condition of the property in question before and after the alleged wrongful appropriation by said company, keeping in mind the rule that the abutting property owner should be made whole as to all things in connection with the location and construction of a railroad which tends to depreciate the value of his property. 48 O. S., 637; 45 O. S., 322; 33 O. S., 435.

Objection is also made to the action of the court below in charging the jury in what is claimed to be the "grouping the claims" of the plaintiff.

It is the duty of the court to properly and fully instruct the jury as to the vital issues in a case, and in summarizing such issues that the jury may intelligently understand them we think there is no ground of prejudicial error.

We have examined the record with reference to the other assignments of error set forth in said petition in error, and find no such error therein for which the judgment entered herein should be reversed. The judgment of the court of common pleas will therefore be affirmed, at the costs of the plaintiff in error, but without penalty. Exception noted.

#### **ACTION ON POLICY OF LIFE INSURANCE.**

Court of Appeals for Highland County.

**THE METROPOLITAN LIFE INSURANCE COMPANY V. DAVID HILLARD.**

Decided, December 23, 1913.

*Life Insurance—Conditions Precedent in Contract Require a Showing of Performance—Burden of Proof.*

A life insurance policy contained the following clause: "provided, however, that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health."

**Held:** That the clause is a condition precedent and the burden of proof was cast upon the plaintiff to show that at the date of the policy the insured was alive and in sound health.

Error to the Court of Common Pleas of Highland County, Ohio.

This case originated in the court of a justice of the peace of Highland county, Ohio.

The action was founded on a policy of insurance issued by the plaintiff in error on December 11, 1911, on the life of Elsie Hillard, who was the wife of defendant in error. Elsie Hillard died March 18, 1912.

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The petition pleaded the issuance of the policy, the payment of all premiums, and that said Elsie Hillard and plaintiff duly performed all the conditions of said policy on their part to be performed.

The defendant, in its answer, pleaded the following stipulation which is found in the body of the policy of insurance:

"Provided, however, that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health."

The answer also contained the averment that on the date of the policy, December 11, 1911, Elsie Hillard was not in sound health, but was afflicted with tuberculosis, from which she died.

The trial court was requested to instruct the jury that the burden was upon the plaintiff to show that the insured was in sound health when the policy was issued, which instruction was refused, but the trial court did instruct the jury that in order that the insurance company may be entitled to a verdict in its favor the burden is upon it to prove that on the date of the policy Elsie Hillard was not in sound health.

This action of the court, in refusing to instruct as requested, and in giving the instruction stated, is the single assignment of error in the case.

*L. B. Yapple, Wilson & McBride and Miles Townsend, for plaintiff in error.*

*J. G. Whitaker and J. S. Riley, contra.*

SAYRE, J.; WALTERS, J., and JONES, J., concur.

The precise question for determination here is not decided in the Howle case, 62 O. S., 204; 68 O. S., 614.

The learned trial judge seems to have based his ruling on the case of *Piedmont & Arlington Life Ins. Co. v. Ewing*, 92 U. S., 377 (23 L. Ed., 610), where it is held that:

"The burden of proving the truth of the answers in an application for insurance does not rest on the insured or his representative in an action on the policy."

But the Federal Supreme Court in that case held that the answers were merely warranties; and the courts, almost without

exception, have held that where there is a defense of a breach of warranty in an application for insurance, the burden of proof as to that defense is on the insured

The view taken by the trial court is sustained by the following cases: *Chambers v. Northwestern Mutual Life Ins. Co.* (Minn.), 67 N. W., 367; *Murphy v. Metropolitan Life Ins. Co.* (Minn.), 118 N. W., 355; *Francis v. Mutual Life Ins. Co.* (Oregon), 106 Pac., 323, and *Bathe v. Metropolitan Life Ins. Co.* (Mo.), 132 S. W., 743. In *Murphy v. Metropolitan, etc., supra*, the court, on page 356 of the opinion, says:

"Therefore, if the insured was not in fact in sound health on the date of the policy, the defendant is not liable unless it has waived the defense. The burden of alleging and proving such fact was on the defendant. This, for practical reasons, has become the settled law of this state."

While the *Bathe*, *Chambers*, *Murphy* and *Francis* cases, *supra*, support the ruling of the trial court, the majority of the decisions on this question, so far as our investigation has gone, support the view that the burden is on the plaintiff. *Mohr v. Prudential Ins. Co.*, 78 Atl., 554; *Packard v. Metropolitan Life Ins. Co.*, 72 N. H., 1 (54 Atl., 287); *Johnson v. Merchantile Town Mut.*, 96 S. W., 697; *Hennessey v. Metropolitan Life Ins. Co.*, 52 Atl., 490; *Barker v. Metropolitan Life Ins. Co.*, 74 N. E., 945; *Lee v. Prudential Life Ins. Co.*, 203 Mass., 299 (decided October 19, 1909); *Anders v. Life Ins. Clearing Co.*, 62 Neb., 585; *Volker v. Metropolitan Life Ins. Co.*, 21 N. Y. Sup., 456; 25 Cyc., 719.

It will be seen from the authorities above referred to that while the stipulation in the policy under consideration may be a warranty it is more than that—it is a condition precedent. The promise of the defendant was conditional, and it became absolute only in the event that on the date of the policy the insured be alive and in sound health.

The authorities above quoted from, which hold that the burden is on the defendant, do not show that this clause in the policy above quoted is not considered a condition precedent, but the burden in those cases was placed on the defendant "for prac-

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tical reasons." *Murphy v. Metropolitan Life Ins. Company, supra.*

In view of the fact that such clause in the policy is a condition precedent the provisions of Section 11339, General Code, become highly important:

"In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part. If such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance."

The plaintiff below pleaded, generally, that he and the insured performed all the conditions on their part to be performed, which was strictly in accordance with the statute, but the defendant then pleaded this condition precedent or rather averred the non-existence of a fact or state—sound health—which constituted the condition precedent and a failure to comply with it. Under the provisions of Section 11339, it then became imperative, on the part of the plaintiff, to prove that at the date of the policy the insured was alive and in sound health. This threw the burden on the plaintiff, and the failure to so charge was prejudicial error.

The judgment of the court of common pleas will be reversed, and the cause remanded to that court for a new trial.

**LIABILITY FOR INJURY TO AN AUTOMOBILE WHILE BEING  
LOADED FOR SHIPMENT.**

Circuit Court of Summit County.

**ARTHUR H. MARKS V. THE UNITED STATES EXPRESS COMPANY.**

Decided, October 11, 1909.

*Negligence—Evidence—Ambiguous Signal—Agency.*

1. Whether an ambiguous signal, given by a representative of an express company to the owner of an automobile who was about to propel it up skids into a car for the purpose of having it transported, was a signal to come forward or stop, is a question for the jury.
2. Even if such signal was intended as a signal to come forward and move the automobile up into the car, the owner of the automobile was not thereby constituted the agent of the express company in such sense as to make his subsequent negligence, if any, the negligence of the company.

*Roger & Rowley*, for plaintiff in error.*Hoyt, Dustin, Kelley, McKeehan & Andrews*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The plaintiff in error was the plaintiff in the original action. He brought his suit for damages which he alleges resulted to an automobile owned by him, and which the defendant undertook to transport from the city of Akron, Ohio, to the city of Boston, Mass. The plaintiff was the owner of an automobile and arranged with the defendant, through its agent, Mr. Hadden, at Akron, for the transportation of the automobile to Boston.

It appears from the evidence that at an earlier date the defendant had transported for the plaintiff an automobile from Akron and that considerable difficulty had been experienced in the loading of the auto upon the railroad car of the defendant, and it was agreed between the plaintiff and Mr. Hadden that instead of loading with pulleys and cables, as had been done in the case of the former transportation of an auto, this auto might be loaded by propelling it by its own propelling machinery

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onto the car. The car had doors opening at the end sufficient to allow the auto to pass in. It was arranged that these doors should be opened and that skids or planks should be placed lengthwise from the sill of these car doors out on to the railroad track at such an angle that the auto could be run up these skids by its own power and thus into the defendant's car. On or about the 28th of June, 1907, pursuant to this arrangement, the defendant, through its agent, Hadden, called the plaintiff by telephone and said to him that the car was ready for the shipment of the auto, and asked if the plaintiff could have his auto at the place of loading that afternoon. The plaintiff replied that he would not be able to have the auto there that afternoon, but that he would have it there about 9 o'clock the next morning. There is a disagreement in the testimony as to whether a call was made through the telephone by Hadden to the plaintiff on the morning succeeding the conversation already mentioned, but whether such further conversation took place or not is not important, for on that succeeding morning the plaintiff propelled his auto up to the railroad yard where the defendant's car was standing. He passed that car and having reached a point about 150 feet from the car of the defendant, turned his auto around so as to be headed toward the open end of the defendant's car into which the auto was to be run. Four planks, used for skids, were then in place at the end of the defendant's car leading from the sill of the door of such car out on to the earth between the rails of the railroad track. These planks were placed two on either side of the door sill, leaving a space between the two on the right and two on the left, but on each side, that is to say, on both the right and the left side, the two planks on the sides respectively were placed so close together, that there was a pathway for the wheels of the auto on either side to run up to the railroad car. The outer plank on either side was nailed to the sill of the car door, and stakes were driven into the ground at the end of each of these outer planks. The inner planks were neither nailed nor staked. This being the situation, the plaintiff having his auto in the position already mentioned, saw Hadden, who was standing near the railroad car, make a

signal with his hand. This signal the plaintiff understood indicated that he was to come forward with his auto and run up the skids, that were ready for him. Hadden says that what was meant by the signal was the plaintiff should stop and not come forward, as the skids were not ready. Understanding, however, as the plaintiff did, that the motion made by Hadden's hand indicated that he should come forward with his auto, he moved it forward at a slow rate of speed steering it upon the pathway made by the planks so that it rolled up the planks until the forward wheels of the auto were inside of the car upon the floor, when one or both of the inner planks upon which the end wheels of the auto then were, tipped to such a degree that the end wheels were left without support and the auto dropped and fell and was thereby greatly damaged and injured.

Upon the trial the jury returned a verdict for the defendant. Judgment was entered upon that verdict and by proper proceedings the case is here for review.

It is urged here that the court erred in refusing a motion for a new trial, because it is said that the verdict was not supported by the evidence and was against the weight of the evidence. It is urged further that the court erred in its charge to the jury and in its refusal to charge as requested by the plaintiff.

The claim that the verdict is not sustained by the evidence is based upon the proposition that the evidence clearly shows negligence of the defendant, and clearly shows that there was no negligence on the part of the plaintiff. We are not prepared to say that either of these claims is correct. Hadden had in his conversation with Marks by telephone said to him that the car on which the auto was to be shipped, was ready; he had not said to him that all the arrangements for loading the car were ready. He testifies that he had expected before the car should be run up these planks or skids that the two on either side should be held together by cleats nailed on each end. It seems to be conceded that this seems somewhat improbable because of the fact that the outer plank on either side had already been nailed to the sill of the car. One would suppose that if these planks were to be cleated together, the cleating would have to be done

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before they had been put in place, and not after the outer planks had been nailed to the sill of the car, so that in order to put on the cleats one would have to get under these planks and drive his nails upward, holding the cleats that were to be put on up against the planks. But whatever plan was to be adopted, or whether any plan would have been adopted to make this pathway more firm than it was, it is not clear that the defendant had ever notified Marks that it was ready for use, or that it had not intended to make it more safe for use before the auto should be run upon it. Certainly, under the evidence, the jury might well have found that Marks had never been notified that the skids were ready for the loading of his auto. He had been notified that the car was ready and he had received a signal, which at best can be said to have been ambiguous as to its meaning, and if it were ambiguous before moving his auto on these skids, for it must have been recognized by both the plaintiff and the defendant's agent, that as this was a novel proceeding it would be attended with danger, unless the pathway was made firm and secure, and very secure, for this auto weighed some 3500 pounds, it would not be safe to run the auto upon the pathway of skids. It is said, however, that as the plaintiff with his machine was something like 150 feet from the foot of these skids when he received whatever signal he did receive, and he was seen to move forward with his auto by Hadden, Hadden should have recognized that he misunderstood the signal and given him a signal by motion of his hands or by words, or in some way, that he could not have misunderstood. The explanation of this made by Hadden is by no means so unreasonable as that the jury might not well have believed it. That is, that he saw Marks moving forward with his auto, supposing that he had understood his signal and that he would stop at the foot of the skids and not attempt to go any further until he had learned that everything was safe. Surely, if instead of a wave of the hand Hadden had called out to the plaintiff "Do not come," and had supposed that the plaintiff understood him, whereas, as a matter of fact the plaintiff understood him to say "come," it could not well be claimed that the defendant was bound, as

having thereby wrongfully induced the plaintiff to move his auto forward on the skids. We regard it as by no means clear that the defendant was negligent. As has already been said, this manner of loading an auto was a novel one, and it must have been recognized by all concerned, that considering the great weight of the auto great care should have been taken to have the planks or skids properly placed and secured, and the jury might well have found that since the only notice that the plaintiff had received that the skids were all ready for him to move forward was this signal with the hand, which surely had no certain meaning, the plaintiff did not exercise the care which a prudent man should have exercised under the circumstances. We can not reverse the judgment on the ground that the verdict was contrary to or against the weight of the evidence.

This, perhaps, would cover the proposition urged with vigor by counsel for the plaintiff, both in oral argument and in his brief, that the auto, from the time Hadden made the signal to the plaintiff, up to the time of the accident, was in the custody and under the control of the defendant. It was under the control of the plaintiff, and it can not properly be said that even if the signal given by Hadden was that the plaintiff move his auto forward and up into the car that the plaintiff thereby became the agent of the defendant in such wise that his negligence could be adjudged to the defendant, as between him and the defendant.

The argument is made that if there was any negligence on the part of the plaintiff after he received the signal, such negligence would be chargeable to the defendant on the ground that the plaintiff was acting from that time on as the agent of the defendant. This is clearly unsound. If it had been the auto of somebody else and the signal had been such that the jury should find that it called for the plaintiff to go forward with his auto and drive up the skids, the position would not be so clearly untenable as it is when the plaintiff himself is the one who moved forward the auto, and who was negligent, if anybody was negligent, in moving it forward. If this auto had been the property of some other person and if the plaintiff really had been

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the agent of the defendant, and if while so acting as such agent he had by his negligence caused the injury to the auto, he would himself have been liable, to the owner of the auto, notwithstanding the fact that the defendant would also have been liable in such damages. The negligent agent of one who causes injury is not himself relieved from liability because his principal is liable.

What has already been said disposes of the complaint made that the court erred in saying to the jury that this was a simple case of negligence. The court was right in so saying, because either this was an accident for which nobody was liable, or it was a case where, either by reason of the negligence of the plaintiff or the negligence of the defendant or the combined negligence of the two, injury resulted to the property. If the plaintiff was entitled to recover in this action, the burden was upon him, as the court held, to show the negligence of the defendant, and if his own testimony raised a presumption of negligence on his part, as we are inclined to think it did, the burden was upon him to remove the presumption.

Complaint is made, as has already been said, that the court failed to give to the jury the plaintiff's request to charge, marked "A," found on page 109 of the bill of exceptions.

This was properly refused, as we think, for the reasons already suggested in discussing the other propositions in the case.

The judgment of the court of common pleas is affirmed.

**TRIAL FOR MURDER IN THE FIRST DEGREE.**

Circuit Court for Erie County.

**DOMINIC SELVAGGIO V. STATE OF OHIO.\***

Decided, April 12, 1912.

*Criminal Law—Examination of Jurors on Their Voir Dire—Same Act May be Alleged to Have Been Actuated by Different Intent—State Can Not be Required to Elect Between Counts Charging the Same Crime, When—Competency of Evidence—Charge of Court.*

1. In an examination as to the qualification of jurors to sit in a trial for murder in the first degree, it is not error for the state to ascertain by proper questions whether a prospective juror would insist on a recommendation of mercy, in the event that the verdict were to be based on circumstantial evidence.
2. Where the crime is charged in two counts—the first that the homicide was committed with deliberate and premeditated malice, and the second that it was committed in the perpetration or attempted perpetration of robbery—it is not error to overrule a motion to require the state to elect upon which count it will go to trial.
3. Evidence accounting for certain parties, and for their disappearance on the occasion of the murder charged in the indictment, is competent where so inextricably interwoven with the crime that without it a wrong suspicion might arise as to who was the perpetrator.

*George W. Ritter, for plaintiff in error.*

*Henry Hart, Prosecuting Attorney, and George C. Beis, contra.*

**RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.**

Error to the Court of Common Pleas of Erie County, Ohio.

The plaintiff in error, Dominic Selvaggio, was jointly indicted with one Rocco Klawetch, alias Rocco Lavecchia, for murder in the first degree in killing one Antonio Viscario. The indictment contains two counts, the first count charging the homicide to have been committed purposely and of deliberate and premeditated malice, and the second count charging it to have been com-

\*Affirmed by the Supreme Court without opinion, 86 Ohio State, 366.

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mitted in the perpetration and attempt to perpetrate a robbery of the said Antonio Viscario. The crime is alleged to have been committed upon the 19th day of September, 1911, on Kelley's Island in this county.

Dominic Selvaggio, upon his trial in the court of common pleas, was found guilty by the jury of murder in the first degree under the second count of the indictment, without any recommendation to the mercy of the court, and has been sentenced by the court upon that verdict to death in the electric chair.

The bill of exceptions contains all the evidence and is very voluminous, consisting of some one thousand pages in addition to a very great many exhibits. The case has been argued both orally and in briefs with great ability by counsel, and we have spent much time in giving a thorough and painstaking examination to the entire record as was demanded by the importance of the case. The alleged errors which it will be necessary to examine, relate to the impaneling of the jury, the refusal of the court below to compel the state to elect on which count of the indictment it would proceed, the admission of evidence, the ruling of the court upon a motion to direct a verdict in favor of the defendant, the weight of the evidence, and the charge of the court to the jury.

Many errors are claimed to have occurred in the impaneling of the jury, but nearly all of them relate to the ruling of the court upon questions propounded relative to the death penalty. A fair sample arises in the examination of Horace Ramsdell, who was qualified and served as a juror. During his examination on his *voir dire*, he was asked this question by counsel for the state: "If you were satisfied that the defendant did commit the crime as he stands charged in the indictment beyond a reasonable doubt, would the fact that the state did not produce an eye-witness to the actual killing, influence your mind against the imposition of the death penalty?" Against the objection and exception of the defendant he answered: "I don't think it would; no, sir."

The contention on behalf of the defendant seems to be that the matter of inflicting the death penalty, or recommending mercy upon the returning of a verdict of guilty of murder in the first

degree, rests wholly within the province of the jury, and that it was therefore improper and prejudicial to make the above or similar inquiries.

While the statutes of Ohio leave it entirely with the jury to determine whether they will recommend mercy in the event of returning a verdict finding the defendant guilty of murder in the first degree, yet such recommendation ought to be based on reason and ought not to be the result of mere arbitrary whim or caprice. If a man, for instance, upon examination as to his qualifications as a juror in such a case, should state that if the jury reached a verdict finding the defendant guilty of murder in the first degree he would insist on a recommendation of mercy if the verdict were based on circumstantial evidence, such answer would indicate a condition of mind of which the state should be advised. The state might desire to exercise peremptory challenges and it would then have an opportunity of taking such action as might be proper with knowledge of the existing conditions. We believe and hold the question to be entirely proper and this holding will apply to all similar questions asked of others who were examined on their *voir dire*.

Later, in continuing the examination of the same juror, Horace Ramsdell, it developed that he had an opinion as to the guilt or innocence of the defendant, based largely upon what he had read as to the officers having traced the defendant to Pittsburgh, but upon examination by the court he expressed an ability to lay aside that opinion and base a verdict entirely upon the evidence as he should hear it in court and the charge of the judge. We think the court, having the juror before him and being able to judge not only from his statements but from his manner and appearance, did not abuse his discretion in holding that he was qualified to serve as juror. *Lindsey v. State*, 69 O. S., 215.

At the conclusion of the impaneling of the jury, the defendant was entitled to three additional peremptory challenges which he did not exercise, and the bill of exceptions recites: "There now being twelve men in the panel of jurors, and the state and defendant being both satisfied with the jurors, the jury was sworn." We can not say that he was prejudiced by

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any action of the court in impaneling the jury. The record discloses that both court and counsel exercised the greatest care in protecting the rights of the defendant in procuring an impartial jury, and it appears from the record that a jury was obtained not subject to any legal objection.

At the opening of the case and also at the conclusion of the case made by the state, the defendant moved the court to require the state to elect upon which count of the indictment it would proceed, which motion was overruled and to which ruling the defendant excepted.

It is entirely clear from the record that there was but one transaction constituting the crime charged in the indictment, the first count charging the homicide to have been committed with deliberate and premeditated malice, and the second count charging it to have been in the perpetration or attempted perpetration of robbery. Under such circumstances, it has always been the rule that in order to avoid a failure of justice, the state may set forth the transaction in various counts, and it being but one transaction, may not be required to elect upon which count it will proceed. The action of the court in overruling the motion to require an election was clearly correct (*State v. Bailey*, 50 O. S., 636; *Cottell v. State*, 12 C. C., 467). The rule is concisely stated in 22 Cyc., 394, as follows: "The same act may be alleged to have been actuated by different intents."

The only claimed error in the admission of evidence which appears to be entitled to consideration, relates to evidence of the death by violence of two men known as the Barlinia brothers, upon the same night and in the same locality as that in which Antonio Viscario met his death. The record discloses that Viscario was killed upon the night of September 19, 1911, on Kelly's Island, by having his throat cut almost from ear to ear, after which his body was thrown into the lake. He lived in the west half, known as Number 5, of a double house on that island, which portion of the house was also occupied by the defendant, Dominic Selvaggio, and by Rocco Lavecchia, jointly indicted with him and by the two Barlinia brothers, all Italians. The Barlinia brothers were never seen alive after that night and

their bodies were subsequently found in the lake, their throats being cut in the same manner as that of Antonio Viscario.

In order for the state to make a case against the defendant, the practical necessity rested upon it to account for the Barlinia brothers; and their disappearance upon the same occasion as that of Viscario and at the same place, was so inextricably interwoven with the crime charged in the indictment, that no error was committed by the trial court in allowing the evidence. In the absence of such evidence, the suspicion might well have arisen that the Barlinia brothers were themselves the guilty parties. The trial court in its charge to the jury, very carefully limited the purpose for which the evidence might be considered and it seems to us it was a proper link in the chain of circumstantial evidence bearing upon the guilt of the defendant. The evidence was admissible for the further reason that the defendant had made conflicting statements to account for the absence of the Barlinia brothers.

In the charge of the court to the jury, the trial judge carefully defines, under the first count in the indictment, the crime of murder in the first degree and the various included offenses. In charging relative to the second count, the jury was told in substance that if they found the defendant guilty of an unlawful and purposed killing while in the commission of a robbery, there could be but one of two verdicts, namely, murder in the first degree without a recommendation of mercy, or murder in the first degree with a recommendation of mercy, and that under the charged in the second count of the indictment, there were no included offenses of lower grade. This language has given us some concern. The statement, together with all other propositions in the general charge, was excepted to by the defendant.

The court was perhaps not technically correct in the language there used, if it had remained alone and unexplained by other portions of the charge; but the fullest opportunity was given to the jury in other portions of the charge and in the forms of verdict which were submitted, to find upon every aspect of the case as to any offense charged in the indictment, or any included offense therein, and certainly in view of the holding of

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our Supreme Court in *Adams v. State*, 29 O. S., 412, the defendant has no just cause of complaint.

The remaining alleged errors relate to the action of the court in overruling the motion to direct a verdict, and to the claim that the verdict and judgment are not sustained by the evidence. It would not be profitable to review the great mass of evidence which was introduced in the trial of this case, and it is sufficient to say upon a careful examination of all of it, we are unanimously of the opinion that the verdict of the jury was fully justified and that the court did not err in overruling the defendant's motion for an instructed verdict or for a new trial.

Finding no prejudicial error, the judgment of the court of common pleas will be affirmed.

NOTE.—Selvaggio and his confederate, Lavecchia, were executed in November, 1912.

### TRIAL FOR HOMICIDE.

Circuit Court of Stark County.

JOSEPH ANDY V. STATE OF OHIO.

Decided, February Term, 1913.

*Criminal Law—Qualifications of an Interpreter—Exhibition to Jury of Heart of the Decedent—Charge of Court.*

1. It is not error in a trial for homicide to permit a near relative of one of the witnesses for the state to act as interpreter, where there is nothing tending to show that the said interpreter was in any way biased or prejudiced or interested in the outcome of the trial.
2. Nor is it error in such a case to exhibit to the jury the mutilated heart of the decedent for the purpose of showing the character of the incision which had been made therein as bearing upon the cause of death.
3. The addition by the court to a special instruction to the jury asked by the defendant of the words, "and to some degree contributed thereto," was not prejudicial but mere surplussage, since the conclusion that he was an aider or abettor could not be reached by the jury unless there was evidence tending to show that he did something in furtherance of the common purpose to take the life of the decedent.

*Russell J. Burt*, for plaintiff in error.

*H. C. Pontius* and *Frank N. Sweitzer*, contra.

SHIELDS, J.; VOORHEES, J., and POWELL, J., concur.

The plaintiff in error, Joseph Andy, was indicted by the grand jury of Stark county, Ohio, at the September term, 1912, for murder in the second degree. Afterwards the accused was placed upon trial, and was found guilty as charged in said indictment. A motion for a new trial was filed, which was overruled, and the accused was sentenced according to law. A bill of exceptions was taken, embodying the evidence taken upon the trial, including the charge of the court, and said case was brought into this court for review upon a petition in error filed for that purpose.

Numerous grounds of error are alleged in said petition in error for the reversal of the judgment of the court of common pleas, but the errors relied upon by plaintiff in error and argued to this court are:

1. That the verdict of the jury is clearly against the weight of the evidence.

2. That the court below erred in permitting one Mary Pew, a sister of one of the state's witnesses, to act as interpreter throughout the trial below.

3. That said court below erred in allowing the introduction in evidence of the heart of decedent.

4. That said court erred in its charge to the jury.

5. That said court erred in its charge to the jury upon the subject of aiders and abettors.

6. That said court erred in receiving the verdict as returned by the jury.

First. It is contended that the verdict of the jury was clearly against the weight of the evidence. On account of the importance of the case to the plaintiff in error, as well as to the state, we have reviewed the evidence in the entire record with no little care, and with special reference to the contention of counsel for plaintiff in error on this ground; and as a reviewing court, keeping in mind the rule that the verdict of a jury should not be set aside unless it is manifestly against the weight of the

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evidence, we are of the opinion that the record presents a case which does not require this court to interfere with the verdict of the jury on the ground stated.

Second. It is contended by the plaintiff in error that there was an abuse of discretion upon the part of the court below in permitting one Mary Pew to act as interpreter at the trial of the plaintiff in error, because said interpreter was a relative of certain witnesses who testified upon the trial for the state. The record fails to show that said interpreter was biased or prejudiced, or in any way interested in the outcome of said trial; and exercising a sound discretion possessed by the court presiding at said trial, in the absence of any showing that said interpreter was disqualified to act as such, we think there was no error upon the part of the court in this respect.

Third. It is argued by the plaintiff in error that the court below erred in allowing the state to make profert of the heart of the decedent before the jury. The burden of proving the cause of death being upon the state, it was certainly the privilege of the state, in our judgment, to make such proof by the production of this mutilated organ, as tending to show the character and extent of the incision made therein, and we think that the action of the court in this respect was not erroneous.

Fourth. It is claimed by plaintiff in error that the court below erred in its charge to the jury, and especially upon the subject of aiding and abetting in the commission of the crime charged in the indictment. A written request was submitted by the plaintiff in error, before argument, upon this subject with the request that the same be given by the court to the jury; and it appears that it was so given. But it is claimed that said court, in its general charge, when instructing the jury upon this subject, went beyond the rule of law embodied in said written request, and beyond the rule of law laid down by our Supreme Court upon this subject. An analysis of the instruction given leads us to disagree with the contention thus made; but granting that the words "and to some degree contributed thereto" were added, could, or did, such addition work any prejudice to plaintiff in error? We think not, for if the evidence showed that he

was not a principal, but an aider and abettor in the commission of this homicide, such a conclusion could not have been reached by the jury, under the charge given, unless it appeared in evidence that he said or did something in furtherance of a common purpose to take the life of the decedent, and if such fact did so appear, it would contribute to the execution of such felonious purpose. We are of the opinion that this follows from the very definition of terms "aiders" and "abettors," and that such additional instruction is mere surplusage at most.

Entertaining these views, the exception taken in this respect is held to be untenable, and affords no ground of prejudicial or reversible error.

Fifth. It is also contended that the court below erred in receiving the verdict as returned by the jury, because said verdict does not specify the degree of the crime of homicide of which plaintiff in error was found guilty. This is not a case wherein the verdict of the jury was for any degree of crime other than that charged. He was indicted for second degree murder, and was found guilty of said crime; or, in the language of the verdict returned, "guilty as he stands charged in the indictment." The court below properly instructed the jury that the crime charged included also the lesser crime of manslaughter, assault and battery, and assault, for either of which a verdict of guilty might be returned by the jury, and not guilty of the crime of murder in the second degree as charged in the indictment. But the verdict was: Guilty of the crime charged. In a case where a defendant is charged with first degree homicide, and the jury should find him guilty of second degree, or manslaughter, under the statute as it was prior to the enactment of Section 13692, General Code, then the contention of plaintiff in error might merit consideration, but not under the present statute; nor under the facts in this case where, under the charge of the court, the jury were instructed that they might return a verdict of guilty of either of the offenses hereinbefore mentioned, on one of the several forms of verdict sent to the jury room, or a verdict of not guilty. For the foregoing reasons, we hold that this exception is not well taken.

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We have also examined said record in reference to the other assignments of error set out in the petition in error, and we find no such error therein as to call for a reversal of the judgment of the court below.

The judgment of the court of common pleas will, therefore, be affirmed, and said cause is remanded to said court for execution. Exceptions.

**AS TO WHETHER CERTAIN STATEMENTS WERE FALSE  
REPRESENTATIONS.**

Circuit Court of Lorain County.

**THE J. D. SMITH FOUNDRY & SUPPLY CO. v. THE LORAIN COUNTY  
BANKING CO.\***

Decided, December 28, 1909.

*False Representations.*

1. That the statement: "I have money enough now. I could pay cash for anything I should order if I wanted to," was false is not conclusively shown by proof that the person making the statement did not, at the time, have money in the bank.
2. The statement: "I have plenty of orders on hand," is not unwarranted if the person making it at the time had the promise from various reliable establishments that he should have their orders.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The only question in this case is this: Did the plaintiff in error (which was the plaintiff below) show by the evidence that it parted with its property to Lieblang, by reason of false representations made by Lieblang to the plaintiff? If it did, it was entitled to a recovery in this action. If it did not, the result in the court below was right.

The evidence shows that a Mr. Smith, representing the plaintiff, sold to Lieblang something more than six hundred dollars

\*Affirmed without opinion, *J. D. Smith Foundry Co. v. Lorain County Banking Co.*, 83 Ohio State, 481.

Sisson was indicted under the name of Harry Sisson, alias Herman Connors, alias Joseph St. John, for murder in the first degree; the charge being that he killed Young Pa while he (Sisson) was engaged in perpetrating a robbery. Upon the trial the jury returned a verdict of guilty of murder in the first degree with recommendation to mercy. Whereupon he was sentenced to imprisonment in the penitentiary for the term of his natural life. By proper proceeding the case is here on error.

The plaintiff in error urges as ground for the reversal of the judgment that the verdict was not sustained by sufficient evidence, by reason of which the court erred in overruling a motion filed by him for a new trial, and also that there was error in overruling such motion by reason of misconduct on the part of the prosecuting attorney in his closing argument to the jury. Both of these questions were considered by Judge Washburn upon the hearing of such motion and a very able and instructive opinion was prepared by him upon the overruling of such motion. This opinion is now in our hands and it is not deemed important that very much be said other than what is said in that opinion. We reach the same conclusion which was reached by Judge Washburn.

We think it proper to say, however, with such emphasis as we can, that the language used by the prosecuting attorney, complained of by the plaintiff in error, is deserving of severe censure. It was improper for him to speak of the fact that the prisoner had failed to produce any evidence as to his good character. The language used in that regard was extravagant, and we think the court, when attention was called to it, erred in saying, "the argument is proper." The only justification claimed for this is that the prisoner himself had been upon the witness stand and by his own testimony had shown a bad character, but that was not what he went upon the witness stand for, as he had nowhere by his own testimony or otherwise undertaken to show a good character.

So about the language of the prosecuting attorney in urging upon the jury that they should not only find the prisoner guilty of murder in the first degree but they should not recommend him

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to mercy, and in this connection, referring as he did to his record as prosecuting attorney and the hope that while he held that position in Lorain county no man guilty of murder in the first degree should be recommended to mercy, he was wholly outside of and beyond the duties of the prosecuting attorney.

It was his duty to present the evidence and to make a legitimate argument from such evidence as to the guilt of the prisoner on trial, and he should have left it entirely with the jury to say whether he should be recommended to mercy; it was no part of his duty to urge the jury to overlook any inclination on their part to make such recommendation. Certainly no consideration of the record or reputation of the prosecuting attorney should have been permitted to weigh at all with the jury as to their action in this regard. However, as to this appeal that there should be no recommendation to mercy, the jury disregarded it, so the prisoner suffered nothing from this language unless it had a tendency to induce them to find that the prisoner was guilty.

An examination of the evidence brings us to the conclusion reached by the jury and by Judge Washburn, that beyond all reasonable doubt this man was guilty of the murder of which he was convicted, and that being so, we feel justified in affirming the action of the court of common pleas in refusing a new trial, and of affirming the judgment of that court.

In the Texas case of *Pollard v. State*, 26 S. W., 70, the language of the prosecuting attorney was very much like the language of the case under consideration, but in that case the court refused to direct the jury not to consider these remarks of the prosecuting attorney. In that case the judgment was reversed. It does not clearly appear from the opinion whether it would have been reversed, but for the refusal of the court to charge that this language should be disregarded.

In the Michigan case of *The People v. Evans*, 40 Northwestern, 473, where similar language was used by the prosecuting attorney to the jury, the court held that the wrong thereby caused was not cured by the instruction of the court to the jury to disregard the remark.

In the case of *House v. State*, 19 Tex. Crim. App., 227, the sixth clause of the syllabus reads:

"This court will reverse a conviction because in the trial the counsel for the state abused his privilege of debate, only when it appears, (1), that the remarks used in argument were improper, and (2), that they were of a material character, and such as, under the circumstances, were calculated to injuriously affect the defendant's rights." (See the opinion *in extenso*, and the statement of the case, for statements in argument held not to be such an abuse of privilege as to authorize the reversal of the judgment.)

This is cited with approval in the case of *Coyle v. State*, 21 Southwestern, 765; the same question arises in a Mississippi case, *Hemingway v. State*, 8 Southern Rep., 317. Also in *Wells v. State*, 16 Southwestern, 577; *Heyl v. State*, 109 Ind., 589; *State v. Ean*, 90 Ia., 534; *Price v. Commonwealth*, 99 Ky., 370; *State v. McGeahy*, 3 No. Dak., 293; *State v. Moody*, 7 Wash., 395; *State v. Shawn*, 40 W. Va., 1.

In the second paragraph of the syllabus of the case last cited this language is used:

"Where a criminal trial is in other respects fair, a verdict of conviction will not be set aside for improper remarks of counsel where it" (the verdict) "is plainly warranted by the evidence of the case under the law, and no other verdict could have been found without misconduct by the jury."

In that case among other things which were improperly said by counsel for the state in his closing argument to the jury, were these words: "He is so steeped in crime that he has no friend to sit beside him during the trial." And yet in this case the conviction was affirmed because of the fact that the evidence so clearly established the guilt of the prisoner that no other verdict could have been found without misconduct by the jury.

From these authorities we feel justified in adhering to the general proposition that where it is plain from the evidence that the jury could not if they were sensible men reach any conclusion other than that which was reached, a case should not be reversed, though the conduct of the prosecuting attorney was reprehensible.

We reach the conclusion, therefore, that the judgment of the court below should be and it is affirmed.

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**EXTENT OF LIABILITY OF CONSIGNEE FOR FREIGHT CHARGES.**

Circuit Court of Montgomery County.

**ALVIN J. FINK v. THE P., C., C. & ST. L. RAILWAY.**

Decided, December 30, 1913.

*Railways—Liability of Shipper for Freight Charges—Distinguished From that of Consignee Who Was Not a Party to the Contract for Carriage—Whether or Not the Evidence Tends to Establish a Defense is a Question of Law.*

1. A consignee, not a party to the contract of carriage, nor the owner of the goods in transit, receiving such goods shipped in interstate commerce and paying the freight charged by the carrier thereon, who thereafter, relying upon the correctness of the freight charges, accepts the goods of the consignor and delivers the consideration without notice or knowledge of a higher rate or charge, is not liable for the balance of the true published tariff rate omitted through an error of the shipping clerk of the initial carrier.
2. The doctrine that a shipper is charged with notice of the true tariff freight rate, no matter how obscure or complex, does not apply to a mere consignee whose interest in the goods shipped and whose title thereto vests after delivery by the carrier.

ALLREAD, J.; FERNEDING, J., and KUNKLE, J., concur.

This action originated before a justice of the peace. The railway company sought recovery of a balance of \$15 alleged to be due it and its connecting carriers for the transportation of certain merchandise. The original bill of particulars based the claim upon contract. The amended bill rested upon the conveyance and delivery of the merchandise to Fink upon his request.

There was a verdict and judgment in the magistrate's court against the railway company. This judgment was reversed in the court of common pleas, where a final judgment was rendered for the railway company upon its claim.

The cause is brought to this court upon petition in error by Fink, seeking a reversal of the judgment of the court of common pleas and an affirmance of that of the justice of the peace.

It is contended on behalf of the plaintiff in error that the court of common pleas had no jurisdiction to reverse the judgment of the magistrate, because the motion for a new trial in the magistrate's court was not based upon the grounds stated in Section 10352, General Code.

We think it clear that the court of common pleas had no jurisdiction to grant a new trial upon the weight of the evidence. *Derby, Jr., v. Heath*, 59 O. S., 54.

Under the broad language of the syllabus and opinion of the case cited, there is some plausibility to the contention that the verdict and judgment in the magistrate's court is final and not subject to a review upon any ground. But we have reached the conclusion that whether there was any evidence tending to support the defense in the magistrate's court was a question of law. We rest this conclusion upon the decision in *Kaufman v. Broughton*, 31 O. S., 424, holding that whether there is any evidence tending to support the plaintiff's claim is a question of law, and it seems to us that the same principle should be applied to a case where the evidence does not tend to establish a defense. This question is raised in the record by request to the magistrate to instruct the jury to render a verdict in favor of the plaintiff. While a magistrate is not ordinarily required to instruct the jury, yet the effect of this request was to test the sufficiency of the evidence to support the defense.

The only question, therefore, capable of review by the court of common pleas was whether the evidence tended to support the defense in the magistrate's court.

The judgment of reversal in the common pleas court can only be sustained in case all the evidence, giving it its most favorable construction in favor of the defendant in the magistrate's court, tended to support the railway company's claim.

The evidence in the bill of exceptions tends to show that in August, 1910, a shipper whose full name does not appear delivered a package marked "Indian curios" to the initial carrier at Los Angeles, California, billed to Alvin J. Fink, Dayton, Ohio, and that in due course of shipment the same was delivered to Fink upon his payment of the sum of \$15, being the amount charged upon the bills and receipts tendered and exhibited to Fink.

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The testimony of Fink tends to show that there was no agreement between him and the consignor and that he (Fink) should pay the freight. He further testifies that the goods were shipped to him for examination and under an arrangement that if upon examination the same proved satisfactory they were to be taken by Fink in exchange for certain gold coins which had previously been shipped by Fink to Los Angeles, California, where they were in custody of the postmaster and subject to Fink's order. Fink testifies that he paid the freight charges of \$15 to obtain possession of the goods, and that after examination and without any knowledge or notice that any other or additional freight charges were due he released the gold coins and the same as well as the most part of the curios are now scattered and their whereabouts unknown. The evidence shows that some considerable time after this transaction was entirely closed, the railway company discovered that the true tariff rate of shipment was \$30 instead of \$15, and this claim was thereupon asserted against Fink as consignee.

Was Fink as consignee, therefore, liable under the evidence as a conclusion of law? This question is to be determined under the common law as affected and controlled by the commerce acts of Congress. Under the common law the shipper of goods was liable to carriers for the reasonable rate of transportation and this rate was capable of being fixed by contract. The consignor is generally considered the shipper as between him and the carrier, but the consignee was also held to be liable upon the contract of shipment for the freight charges where such consignee was the owner of the goods or requested or directed the shipment. While there is some conflict of authority, we think under the common law the consignee's liability for the freight charges under the contract of shipment is confined to cases where the consignee was in some way a party to the contract of shipment or was the owner of the goods transported. There is, however, a liability of the consignee, based upon the receipt of the goods upon which freight charges are due. His liability in this respect is entirely different from that of shipper. It rests upon the presumed intention or agreement of the parties at the time of

delivery. *Blanchard v. Page*, 8th Gray (Mass.), page 281; *Cock v. Taylor*, 13 East, 339; *Old Colony Railway Company v. Wilder*, 137 Mass., 536.

There are some English as well as American decisions based upon an express stipulation in the bill of lading to the effect that the consignee agrees to pay the freight but where, as in the case at bar, there is nothing upon the face of the bill of lading tending to impose any liability upon the consignee, except that implied from the collection of the freight charges marked upon the bill, the liability of the consignee depends upon the real circumstances of the case. Here Fink was not a party to the contract of shipment, was not the owner of the goods during transportation and his title vested and the consideration was delivered subsequent to his receipt of the goods. He paid the \$15 charges, not by virtue of any agreement to do so, but because that amount was imposed as a lien upon the property and a condition of delivery. We think there are no circumstances in the case from which under the common law Fink would be held liable for any amount in excess of the \$15 charged and paid at the time the merchandise was delivered. It is contended, however, that the effect of the Interstate Commerce act was to make it imperative upon the railway company to collect from the consignee the full tariff rate, regardless of the mistake of the agents of the railway company and regardless of the consignee's connection with the property or the shipment.

We have examined the following cases decided by the Supreme Court of the United States: *Railway Company v. Mugg*, 202 U. S., 242; *Railroad Company v. Kirby*, 225 U. S., 155; *Railroad Company v. Elevator Company*, 226, U. S., 441; *Railway Company v. Abline Cotton Oil Company*, 204 U. S., 426; *Railroad Company v. Interstate Commerce Commission*, 200 U. S., 361.

All these cases were actions involving the shippers' rights as against the carrier and, therefore, involved the contract of shipment and the liability of the parties thereto. In none of these cases was the liability of the consignee directly involved. His rights must, therefore, be determined by the common law as modified by the Interstate Commerce act.

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Section 6 of the Interstate Commerce act provides:

"That every common carrier subject to the provisions of this act shall file with the commission created by this act, and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and points on the route of any other carrier, by railroad, by pipe line, or by water, when a through and joint rate have been established \* \* \* the schedules printed as aforesaid by any such common carrier shall plainly state \* \* \* all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

Section 6 further provides:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

The Interstate Commerce act was amended June 18th, 1910, so as to make the carrier criminally liable for a misquotation of rates.

The only direct reference to "consignee" in the Interstate act is found in Section 6, in connection with charges made and services rendered to the "passenger" or "shipper." We think this paragraph should be limited in respect to the consignee to one at whose instance the service was had and who becomes liable under the contract of shipment for the freight charges. This paragraph was not intended to create a new liability, but as a regulation of charges against persons at whose instance or for whose benefit the service was had.

The final reasoning brings us to a consideration of the paragraph of Section 6 prohibiting the carrier from charging, demanding or collecting "a greater or less or different compensation" than the tariff rates. This prohibition is addressed specifically to the carrier, but, under the broad principle of public policy underlying the Interstate Commerce act, is sufficient to

charge the shipper or other party originating the service who is bound to take notice of the tariff rate no matter how obscure or difficult.

It is urged that the same inexorable rule of public policy should be applied to the consignee no matter what his relation to the property is. This contention is founded upon the second syllabi of *Railway Company v. Mugg*, *supra*, and also *Railway Company v. Magnus*, 13 C.C.(N.S.), 305.

In the *Mugg* case the liability of the consignee was incidental, and the syllabus referred to relates to the rights of the company at the time of delivery, and should not in our opinion be generally applied to all persons who happen to deal with railway companies in relation to the property.

In the *Magnus* case the mistake in the freight charge was discovered before the property was delivered, and the delivery was made under a general arrangement charging the amount of the freight against the shipper instead of collecting it before delivery. We think the syllabus in the latter case as well as the opinion should be limited by the facts of the case, and so also the syllabus in the *Mugg* case should be limited to cases where the freight charge and the delivery are concurrent. The rule of public policy, charging notice of the tariff rates against shippers, does not apply with equal reason to a mere consignee who receives and deals with the property upon the faith of the railroad company's charges stated in the bill of lading. Such consignee should not be charged like the original shipper with the duty of ascertaining the public tariff rates, nor is he chargeable with ascertaining the fact as to whether all or only a portion of the tariff rates are made chargeable against him. Undoubtedly if the shipment had been delivered under a bill of lading showing freight paid, it could not in reason and justice be claimed that the consignee was bound to ascertain the fact of prepayment. Public policy does not require that our remedial laws should be made an instrument of injustice or oppression.

Fink when he received the goods found charged thereon \$15 which he paid. We think he was not bound as a matter of law to go further than what appears upon his bill of lading and re-

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ceipt in the investigation of the amount of charges, and having paid that, there is no further personal liability.

It, therefore, follows that the judgment of the court of common pleas should be reversed and that of the magistrate affirmed.

**INJUNCTION AGAINST SALE OF ILLEGAL PORTION OF AN  
ISSUE OF MUNICIPAL BONDS.**

Circuit Court of Summit County.

CHARLES R. MORGAN, AS A TAX-PAYER, ON BEHALF OF THE CITY  
OF AKRON, v. THE CITY OF AKRON ET AL.\*

Decided, December 30, 1909.

*Municipal Corporations—Sale of Bonds—Whole Issue Not Enjoined  
Where Part Only Illegal—Bonds for Sidewalk and Retaining Wall  
in Street Not Lawful.*

1. When in one ordinance a municipality provides for the issue and sale of bonds to pay for several separate improvements, for some of which it has authority to issue bonds and for others it has not, an injunction will not be granted against the entire issue proposed, but only against that part which is for the payment of unauthorized improvements.
2. A municipality can not raise money by the sale of bonds to pay for the construction of a sidewalk and retaining wall in a street, though the improvement of the street is adjacent to a park.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Morgan is a tax-payer of the city of Akron; he called on the city solicitor, in writing, to bring this action, which the city solicitor declined to do. Unless restrained by the order of this court, the defendants will issue bonds of the city of Akron, under an ordinance passed February 15, 1909, and sell said bonds for the purpose of improving Goodwin avenue, by grading, paving and curbing; Haynes street from about 120 feet from Thornton street to Howe street by the construction of a

\*Affirmed without opinion, *City of Akron v. Morgan*, 84 Ohio State, 499.

sewer therein; Amherst street from Thornton street to the Ohio canal by the construction of a sewer therein; Snyder street from a point 145 feet from Thornton street to Campbell street by the construction of a sewer therein; for the construction of a storm water sewer along the right-of-way of the Erie Railroad Company and the Cleveland, Akron & Columbus Railway Company from Market street to Oil street, thence in and along Oil street from the railroad to the Hydraulic race; for constructing sidewalks and a retaining wall at Pleasant Park; for improving and repairing streets, and for flushing, constructing and repairing sewers, ditches, drains and catch basins.

The prayer of the petition is that the defendants may be restrained from issuing or selling any such bonds, and from expending the proceeds or any part thereof obtained from any such sale, for any of the purposes named.

It is urged on the part of the plaintiff that the issuing of bonds for any such purpose is without authority of law, or, in any event, that the avails of such bonds can not be used for all of said purposes, and that if the bonds may not be issued for all of such purposes then that, as a single ordinance of the city provides for the issue and sale of bonds for all of such purposes, the court should enjoin it from the issuing and selling of said bonds for any of such purposes.

So far as the issuing of bonds for all the purposes named, except for constructing sidewalks and a retaining wall at Pleasant Park is concerned, we think the council had authority to provide for the sale of the bonds. As to the constructing of the said sidewalk and retaining wall, we think the council was clearly without authority to issue bonds or to use the avails of the sale of any bonds for this last named purpose.

Section 2835 of the Revised Statutes provides for what purposes municipalities may issue and sell bonds.

Paragraph 22 of said section provides that such bonds may be issued and sold for resurfacing, repairing, or improving any existing street or streets, as well as other public highways. We think this is sufficient authority for the using of funds raised by the sale of bonds for grading and paving Goodwin avenue, and for improving and repairing streets.

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Paragraph 14 of said section authorized the issue and sale of such bonds for constructing sewers, sewage disposal works, flushing tunnels, drains and ditches, and we think this sufficiently authorizes the construction of a sewer in Haynes street, Amherst street, and for the construction of a storm water sewer along the right-of-way of the Erie Railroad Company and the Cleveland, Akron & Columbus Railway Company, and thence in and along Oil street.

The only language in the section which it is claimed authorizes the using of money from the sale of bonds "for constructing sidewalk and a retaining wall at Pleasant Park" is paragraph 20 of the section under consideration, which reads:

"For purchasing and condemning the necessary land for park and boulevard purposes, and for improving the same, as well as for improving or completing the improvement of any existing boulevard, park, or parks."

The evidence shows that it was a sidewalk along the south side of East Thornton street that it is proposed to construct with the money obtained on the sale of these bonds, and that it is a retaining wall along the south side of said street that it is proposed to construct. East Thornton street extends along the north side of Pleasant Park, but constitutes no part of the park itself, and from this it follows that to construct the sidewalk and the retaining wall proposed, would not be an improvement of an existing park, but simply the construction of a sidewalk and retaining wall in a street adjacent to a park. For this purpose money can not be raised by the sale of bonds, and the order of this court is that the defendants be enjoined from issuing, selling or using the avails of the sale of any bonds under said ordinance for constructing sidewalks and a retaining wall at Pleasant Park.

Plaintiff's attorneys will be allowed a fee of \$100 in this case.

**LIABILITY OF MUNICIPALITY FOR DAMAGES FROM  
A LANDSLIDE.**

Court of Appeals for Hamilton County.

**CITY OF CINCINNATI V. CHARLES FILSER.**

Decided, February 14, 1914.

*Municipal Corporations—Removal of Support of Hillside in Improving  
Street—Earth Slips Upon Adjoining Property—City Liable.*

Where a municipality removes earth from a hillside in improving a street, the soil of which hill is known to be slip soil, without shoring up the bank the support of which is thus removed, and a slide upon the lot of an abutting owner results after a hard rain, liability for the damage thus suffered can not be escaped on the ground that the work was being done by an independent contractor, or that the city was the owner of the dominant tenement, or that the slipping of the hillside following a heavy storm and downpour was an act of God.

*Coleman Avery*, Assistant City Solicitor, for plaintiff in error.  
*Geoffrey Goldsmith and Guido Gores*, contra.

JONES, E. H., J.; SWING, J., concurs; JONES, O. B., J., dissents in a separate opinion.

The plaintiff in error seeks to reverse the judgment of the court below, assigning many reasons why this should be done.

The case presents numerous interesting questions and has been the source of much discussion among the members of this court, and has received prolonged and careful consideration at our hands. The majority of the court are of opinion that there was no prejudicial error in the trial below and that the judgment of the court of common pleas should be affirmed.

The negligence alleged in the petition, is that the city failed to bolster up or shore up the soil of the hillside while they were engaged in removing dirt from the street opposite the plaintiff's residence and that the city's negligence in this respect caused the damage to plaintiff's property. This statement is sufficient to explain the nature of the complaint although it may not be

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complete. The evidence offered at the trial fully supports this charge of negligence in the petition. It is shown by the evidence that the city through its civil engineer and other officers and employees had actual notice of the danger to adjoining property which attended the work upon which they were about to enter. The evidence further shows that at the time the slide occurred precautions, which, in the opinion of expert witnesses produced at the trial, were necessary owing to the known nature of the soil, had not been taken.

There is no claim in the answer, nor is there any attempt to show by evidence, that it would have been impossible upon the part of the city in the exercise of reasonable care to have prevented the damage which we think the evidence shows followed as a natural consequence of the character of the work being done. The duty resting upon the city as well as upon an individual to so carry on its work, even upon its own premises, as not to interfere with or cause damage to its neighbors, we feel that the evidence was sufficient to warrant the jury in finding actionable negligence on the part of the city.

It is claimed that the work was being done by an independent contractor. This claim we think is fully and ably answered in the brief of counsel for defendant in error. The work was shown to be dangerous to adjoining property owners unless carried on carefully. Such being the case, the city could not absolve itself from liability by employing another to do the work.

It is further claimed that the city was the owner of the dominant tenement and had a right to the lateral support of its street by the ground of defendant in error. This is all true, but the trouble is that it had no application to the facts in this case. The jury must have found in this case that the work being done by the city had a direct connection with the slipping of the hill. The damage was not caused by the weight of the street toppling over the wall that had been built by the defendant in error; it was caused by the dirt from the hill slipping down upon and underneath the street, and the very doctrine urged here by the plaintiff in error made it the duty of the city to provide a lateral

support along the line of its street, and if by failing to do so it caused the injury to another's property, particularly while it was engaged in digging and removing the soil of the hill, we think its failure so to do makes it liable for any damage resulting therefrom.

It is also claimed by plaintiff in error that the damage was due to "an act of God." In this connection it was claimed that just before the slide occurred which caused the damage, there was an extraordinary rainfall. There is nothing in the evidence to show that this rain was an unprecedented one, nor does the evidence clearly establish that it was unusual for the season of the year in this latitude. We hold that such rains as this must reasonably be anticipated and that the city can not be excused from the consequences of its negligence by not contemplating the probability of heavy rain.

We find no error in the charge of the court, nor any prejudicial error in its refusal to give certain special charges requested.

There being in the opinion of the majority of the court no errors apparent on the record, the judgment of the court below will be affirmed.

JONES, O. B., J. (dissenting).

I am not able to agree with the majority of the court in the decision of this case.

In the first place, the amended petition under which the trial was had fails to allege that any claim for damages had been filed with the clerk of the city, and that sixty days had elapsed thereafter before the filing of the suit. Such an allegation was contained in the original petition but it was superseded at the time of the trial by the amended petition and of course is not to be considered. The record of the evidence also fails to show proof that any such claim was filed. This being an action for damages occasioned, as claimed by plaintiff, by a street improvement, Section 3830 of the General Code makes the filing of such a claim a prerequisite.

There are two of these claim sections in the statutes relating to street improvements: Section 3823 applying to claims of

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abutting property owners where the damages are obvious; and Section 3830 in its terms applying to "damages arising from any cause." The difference between these two sections is discussed by the Supreme Court in the case of *Cohen v. Cleveland*, 43 O. S., 190, in the opinion of the court at page 195. While the language of Section 3830 is general it has been limited by the case of *Davis v. Warren*, 43 O. S., 447, to damages arising from street improvements. The failure to file such a claim is a bar to the action (*Ernst v. Kunkle*, 5 O. S., 521; *Cohen v. Cleveland*, 43 O. S., 190, 195). These sections are also discussed in the opinion of the court in the case of *Ironton v. Wiskle*, 78 O. S., 41.

Outside, however, of this failure to show the filing of a claim, in my opinion, the judgment is not sustained by the evidence. The record of the evidence is very unsatisfactory in clearly determining just how the improvement of Glenway avenue was made by the city, and just when and how the damage resulted to the plaintiff below. It does, however, show that Glenway avenue extends up a hill with a steep hill extending upward on the west side and downward on the east side; that the house of the plaintiff was built up to the street line on the east or lower side of the avenue and that opposite it the surface of the hill had slid down covering a part of the west side of the street; that the improvement made by the city consisted simply in repaving a macadamized street with granite pavement and the building of a concrete retaining wall along the west side to prevent future slides. It appears that the land lying west of Glenway avenue up as far as Wilder avenue was owned by a private party, the traction company, who had thrown upon it masses of dirt taken off of Wilder and Warsaw avenues. All of the witnesses agree that this hillside was composed of what they call "slip soil" that had been sliding more or less for years, ever since they can remember. It also appears that plaintiff had suffered damages to his house by previous slides, and that his sidewalk and water-pipes had been broken from time to time by the bulging up of the street; that his foundation had been thrown down and was rebuilt because of a slide about three

years before the one complained of in this case. It is hard to determine from the evidence just what the facts are as to the particular slide or slides which caused the damage. The only testimony given is by plaintiff himself and another property owner, Mr. Ahern, and Mr. Kuhlman, who was at one time building inspector, and Mr. Rees McDuffie, who operated the incline railway south of this property and who was an old resident of that locality. None of these witnesses give a detailed account of the method of the improvement or the nature of the slide which caused the damage. The two latter witnesses named above advised the city engineer and his assistant that certain precautions should be taken to avoid a hill slide, the latter suggesting that the soil which had been placed at the top of the hill on the property of the traction company should be first removed by the city, and Mr. Kuhlman advising that the engineer should drive piles to prevent sliding. He afterwards admitted that the piles were driven by the engineer in the trenches which were made for the foundations of the concrete wall and were driven just as he thought they should be. It appears that these trenches were dug in sections not more than fifty feet long and piles were driven in the bottom and the concrete laid upon them, and that these trenches were not dug until after the damage to plaintiff's house. Plaintiff himself gives the best story of this damage, and his testimony would indicate that there was but one slide which caused the damage and which occurred on June 27th or 28th and was contemporaneous with a severe and unusual rainstorm which was described by the United States Observer as being very heavy, and which defendant claims caused the slide.

It appears that at the time of this rainstorm the only work that had been done in the matter of the improvement was the removal of the slope of earth that had encroached upon the west side of the street in the cleaning off of the street preparatory to repaving, and that the trench to which plaintiff attributed the slide had not at that time been dug.

The allegations of negligence in the amended petition were that the defendant and its agents knew or should in the exercise of reasonable care have known that to improve Glenway avenue,

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without bolstering or shoring up the street or the land above by wall or shoring so as to prevent a slide or slip of the said street against and into said lot and against the fall of soil and dirt against said lot, would as a direct consequence cause a slip of the said street and of said lot, and would cause the fall of soil from said street onto said lot and would thereby cause damage to said lot and to the improvements thereon; and that

“The defendant city, despite its knowledge or despite the knowledge which in the exercise of ordinary care it should have had, or the nature of the soil and of the locality and of the consequences of its own acts, negligently failed in the exercise of ordinary care to shore up said street or the land above it as a protection to plaintiff’s aforesaid lot against damage.”

The plaintiff can only recover by proving the acts of negligence alleged in the petition and that such negligence caused the damage. *R. R. v. Kistler*, 66 O. S., 326, 333; *R. R. v. Lockwood*, 72 O. S., 586, 590-1; *Elster v. Springfield*, 49 O. S., 82, 101.

In my opinion the negligence complained of was not proven but is merely a matter of inference, as there was no attempt to show in any way how the city could have shored up or bolstered up either the street or land to the west of the street without first digging foundations for the necessary retaining walls, as was really done in this case.

“To establish negligence there must be direct proof of facts constituting such negligence, or proof of facts from which negligence may be reasonably presumed. There should be no guessing either by court or jury.” *R. R. v. Marsh*, 63 O. S., 236.

The rights of plaintiff and the city as owners of adjoining premises come under the law relating to lateral support. The city as the owner of the street, the dominant tenement, owed no legal duty to hold up plaintiff’s house as the servient tenement. On the contrary it was the duty of the plaintiff or his predecessor in title, when his cellar wall was excavated and the house was built, to so construct his cellar wall as to sustain and support the street as fully as the hill in its natural state would have done. The same rule might be invoked to require the city to hold the hill west of the street from sliding while in its natural

condition, but could not be extended to require it to support same where it was caused to slide by the fact that large quantities of excess dirt had been piled thereon by its owners. *U. S. v. Peachey*, 36 Fed. Rep., 161; *Village of Haverstraw v. Echerson*, 192 N. Y., 54, 59; *Milburn v. Fowler*, 27 Hun., 568; 1 Cyc., 775, 777.

I think the court erred in refusing to give the following special charges which were asked by the defendant and which I believe should have been given:

"4b. The petition avers that in the exercise of ordinary care the street, Glenway avenue, and the land above, while the work in Glenway avenue was in progress should be bolstered and shored up and retained by walls and shoring to prevent a slide or slip of said street against and on to plaintiff's lot, and that the city negligently failed in the exercise of ordinary care to shore up said street or the land above. This being the only negligence alleged is the only negligence you can consider. Plaintiff must prove by a preponderance of the evidence that in the exercise of ordinary care the city should have done things he mentions and that the city negligently failed to do those things. Unless plaintiff has proved all this by a preponderance of the evidence as aforesaid, your verdict should be for the defendant.

"6. The jury are charged if they find that the slide of which plaintiff complains was caused by extraordinary rain, or would not have occurred excepting for an extraordinary rain, the verdict should be for the defendant. By extraordinary is meant not necessarily a rainfall of a volume or intensity which never had before occurred in this vicinity, but one which is so heavy as to be unusual, and not to be reasonably anticipated and guarded against by persons using ordinary care and prudence in the progress of work of the kind which the evidence shows was called for in the improvement of Glenway avenue.

"7. The jury are charged that if persons other than the city of Cincinnati piled earth or other materials on the space between Wilder and Glenway avenues west of plaintiff's premises which caused the slip of which plaintiff complains, the verdict should be for the defendant."

Defendant was entitled to have these charges, which are correct in form, given before the argument to the jury.

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Summit County.

**LIMITATION ON THE ISSUE OF MUNICIPAL BONDS.**

Circuit Court of Summit County.

**CHARLES R. MORGAN, AS A TAX-PAYER, ON BEHALF OF THE CITY  
OF AKRON, v. THE CITY OF AKRON ET AL.\***

Decided, December 30, 1909.

*Municipal Corporations—Sale of Bonds—Bonds for Cleaning Catch  
Basins and Streets Unlawful.*

A municipality can not raise money by the sale of bonds to pay for the cleaning of catch basins or streets.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The plaintiff is a tax-payer of the city of Akron; he served notice on the city solicitor asking him to bring this suit, which the city solicitor refused to do. Unless restrained by the order of the court, the city will, under an ordinance passed on the 19th day of April, 1909, issue and sell bonds of said city for the purpose of improving and repairing Allyn street sewer from Main sewer in Wolf Dedge Run to a point 300 feet southerly; Cuyahoga river sewer outlet; Maiden Lane alley sewer from Mill street to a point 200 feet northerly therefrom; storm water sewer from Water street to the Ohio canal, near Chestnut street; culvert in east Exchange street; cleaning catch basins, and Munson street, and unless restrained by order of this court the defendants named as the trustees of the sinking fund will purchase said bonds.

The section of the statute relied upon as justifying the issue and sale of these bonds is Section 2835, Revised Statutes. To the provisions of this section attention has been called in an opinion just prepared in cause No. 898, in this court. This section justifies the issue and sale of these bonds and the use of the avails of such for all of the purposes named, except that which is embraced in the words "cleaning catch basins and Munson

\*Affirmed by the Supreme Court without opinion, *City of Akron v. Morgan*, 84 Ohio State, 499.

street." Just what is meant by the words "and Munson street" we are unable to say. Probably what is meant is that the money is to be used for cleaning Munson street. There is no authority under this statute for the issuing of bonds for the purpose of cleaning a street, or cleaning catch basins, and the defendants, other than the ones named as trustees of the sinking fund, will be enjoined from issuing and selling, or using the avails of any sale of bonds under said ordinance for cleaning catch basins or on Munson street and the defendant, trustees of the sinking fund, are enjoined from purchasing any bonds issued for the purpose of doing any work contemplated in the ordinance of April 19, 1909, already mentioned, on Munson street, or for cleaning catch basins.

The plaintiff's attorneys will be allowed a fee of \$100 in this case.

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**SALES BY A MUNICIPALITY.**

Circuit Court of Lucas County.

**KERLIN BROS. v. CITY OF TOLEDO.**

Decided, June, 1909.

*Municipal Corporations—Basis of Dealings where Property is Sold by the City.*

City officers can not bind the municipality as to title or quantity of property offered for sale, and a purchaser of property so offered can not maintain an action for the value of property not delivered.

*Marshall & Fraser, for plaintiff in error.*

*Charles S. Northup, contra.*

**KINKADE, J.; PARKER, J., and WILDMAN, J., concur.**

In this case Judge Barber directed a verdict in favor of the city at the close of the testimony. We think the petition does not state a cause of action. No fraud or deceit is charged, nor is it stated that the plaintiff did not know the quantity of pipe

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that the city had for sale. The city had power to sell the pipe it owned, but no authority to sell property it did not own. The plaintiff having paid the amount of the bid to the city, might under certain conditions have rescinded the contract, but we think the plaintiff did not have the right to treat the contract as if made by an individual, and sue for the value of the property not delivered. The city officials can not bind the city as to title or quantity. The judgment of the court of common pleas will be affirmed.

### ACTION FOR BREACH OF CONTRACT.

Circuit Court of Cuyahoga County.

TAPLIN, RICE & COMPANY V. MCKEEFREY & COMPANY.

Decided, December 20, 1909.

*Contract for Sale of Pig Iron—Delivery—Time Not of Essence of Contract—Measure of Damages.*

1. In a contract for the delivery of 150 tons of pig iron to the defendant free of freight charges on board cars at Leetonia, Ohio (the place of business of the plaintiff), "in about equal monthly proportions during the last three months of the year 1907," time of delivery is not of the essence of the contract, and where the plaintiff shows that he was ready, willing and able to deliver the pig iron during the time agreed, but defendant refused to receive it, he may recover damages for breach of the contract.
2. Where the seller of pig iron is not the manufacturer of it, upon the breach of a contract for the purchase of pig iron from him, the measure of damages is the difference between the contract price and the market price at the time specified for delivery.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The relation of the parties here is the reverse of their relation in the court below. The terms plaintiff and defendant as used in this opinion refer to the parties as they stood in the original action.

The plaintiff is a co-partnership, the defendant is a corporation. The plaintiff sued to recover from the defendant for an

alleged breach, on the part of the defendant, of a contract entered into between the parties on the 10th day of June, 1907. The suit originally included a claim for damages growing out of the alleged violation of another contract between the same parties, but that was abandoned, so that the suit was tried upon the claim first above stated.

By the contract of June 10, 1907, the plaintiff agreed to sell to the defendant, and the defendant agreed to buy from the plaintiff one hundred and fifty tons of No. 2 Allegheny pig iron, the same to be delivered to the defendant free of freight charges on board cars at Leetonia, Ohio, in about equal monthly proportions during the last three months of the year 1907, and the defendant agreed to pay the plaintiff therefor the sum of \$24 per ton, the same to be paid for in cash within thirty days from date of shipment, or by four months' note with interest at 6% per annum, interest to begin thirty days after shipment.

The plaintiff alleges in its petition that it was ready, able and willing to perform the contract on its part, but that the defendant on the 27th day of September, 1907, notified the plaintiff that it had sold its property, real and personal, and assets of every description, and from that time forward refused to accept and pay for the iron so contracted for, and so the plaintiff prays for damages.

The defendant answered admitting that it entered into the contract, as stated in the petition; that it notified the plaintiff that it had sold its assets, and it denies every other allegation of the petition. And further the defendant answers that it frequently demanded and requested of plaintiff to furnish the iron in question in accordance with the contract; that the plaintiff neglected to make such delivery at the time agreed upon, and that because of such refusal the defendant notified the plaintiff that it would not accept any iron under the contract.

Upon the trial it developed that the assets of the defendant had been purchased by a Mr. Clerkin, and there was a new corporation organized to take over the business of the defendant, which new corporation was known as "the Taplin, Rice, Clerkin Company," of which Mr. Clerkin was the principal officer and

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stockholder, and the notice, already mentioned, of September 27, 1907, was made because of this sale. In that notice, which was in the form of a letter, the defendant said to the plaintiff that "we find that we still have due from you considerable iron to be delivered through the balance of the year. Mr. Clerkin and his associates are putting money enough into the concern to put in a good financial condition, and hereafter all of our bills will be discounted, instead of being settled by notes in the past. In view of this fact and also that iron is considerably cheaper now than when the contract was made with you, we would like to inquire if there are any concessions that you could make on the iron still due us?"

To this the plaintiff answered, declining to make any concessions. This answer was dated October 8, 1907.

On the 11th of October, 1907, there was written by the Taplin, Rice, Clerkin Company a letter to the plaintiff urging that there be a concession made in regard to the price of the iron contracted for by Taplin, Rice & Company. On the 14th day of October, 1907, the plaintiff wrote to the last named corporation again declining to make any concessions. On the 17th of October, 1907, the last named corporation wrote the plaintiff saying, among other things, "We wish you would send the number of tons you still owe us on these contracts, as we want to see how they correspond with our records here." On the 18th of October, the plaintiff answered this letter, in which, among other things it is said: "We also have your contract under date of June 10, 1907, for 150 tons of No. 2 Allegheny at \$24 cash, f.o.b. furnace, on which there was no iron shipped." On the 30th of October the new corporation wrote the plaintiff that a Mr. Fisher of that company would probably call upon the plaintiff the next day regarding the pig iron contracts that were unfilled. On the 31st of October, the plaintiff wrote the new corporation that Mr. McKeefrey, one of the partners in the plaintiff co-partnership would not be at home either on that day or the next, and saying that they had tried to communicate by telephone with Mr. Fisher.

On the 5th of November, the plaintiff wrote the defendant saying among other things: "We are prepared to make ship-

ments on your contracts and will be glad to have you advise us when you want to have shipments resumed. On the 13th of November the new corporation wrote the plaintiff not to ship any more pig iron on any contracts with the defendant. On the 15th of November the plaintiff wrote the new corporation that as its contracts were with the defendant, they would have to do business with it (Taplin, Rice & Co.).

Enough of this correspondence has been given to show that the plaintiff shipped no iron under the contract of June 10, 1907, in the month of October, whereas by the contract it was to be shipped "in about equal proportions during the last three months of the year." The plaintiff does not plead any waiver of it on the part of the defendant, but relies for recovery on the allegation that it was ready, able and willing to furnish the iron under the contract, and that the defendant refused to accept it. If time of delivery were of the essence of this contract, we should have the question here of whether, the plaintiff having failed to deliver the first shipment under the contract, the defendant might revoke the entire contract. But we think it clear that neither party regarded *time of delivery* as of the essence of the contract. The letter of October 30th to the plaintiff can not well be explained, except upon the theory that the defendant did not regard the delivery of the iron in October as *essential* to the performance of the contract on the part of the plaintiff.

The evidence shows that the partners constituting the plaintiff co-partnership were Neal J. McKeefrey, John McKeefrey and William D. McKeefrey, and that they were officers of a corporation engaged in the manufacture of pig iron at Leetonia, Ohio, the place where this partnership was located, and in the correspondence which has not been quoted, the plaintiff refers to its connection with this manufacturing corporation, and gives as a reason why no concessions could be made as to the price of the iron, that the manufacturing company declined to make any change in the price to the plaintiff. And, it is urged, that the plaintiff should be treated exactly as this manufacturing company should be treated if it were the plaintiff here, and it is said that the measure of damages, if the plaintiff was dam-

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aged, would be the difference between the cost of manufacture and the contract price, whatever the measure would be in the case of one who sells property of which he is not the manufacturer. However, this may be, the evidence did not warrant the court in holding that the plaintiff was to be treated as the manufacturer of the iron which was to be delivered under the contract.

The plaintiff gave evidence tending to show that it could have delivered the iron required by the contract substantially at the times severally specified, and also tending to show that the price of pig iron was considerably less at the time when it was to have been delivered than the price which the defendant agreed to pay for it, and that therefore the plaintiff suffered a loss by reason of the refusal of the defendant to accept the iron. At the close of the evidence on the part of the plaintiff a motion was made to have a verdict directed for the defendant. This motion was overruled, and we think properly overruled, if we are right in saying that the evidence tended to show that time of delivery was not of the essence of the contract, and that the plaintiff was ready, able and willing to perform; for then clearly no verdict should have been directed for the defendant. This motion was renewed at the close of all the evidence, and was again overruled, and for the same reasons that the court was justified in refusing the motion at the close of the plaintiff's evidence the court was justified in refusing the motion at the close of all the evidence.

At the close of the evidence the defendant submitted certain propositions in writing, which it requested the court to charge singly and not as a series. It does not appear from the record, nor do we understand that it is claimed here, that these propositions were requested to be given in writing before argument. The first of these requests was not proper, because of the first sentence in such request which reads:

"I say to you, gentlemen of the jury, that time is of the essence of the contract entered into between the plaintiff and the defendant on the 10th day of June, 1907."

In the second request this language is used:

“The plaintiff must show that it has fulfilled the contract entered into between it and the defendant on the 10th day of June, 1907, as to the delivery of the iron to be furnished by it to the defendant.”

Of course if this proposition had been given, it would have been equivalent to saying that the plaintiff could not recover, because there was no claim that it had fulfilled its contract, but only that it was ready, able and willing to fulfill it, and that it failed to fulfill, because of the refusal of the defendant to receive the iron.

Without stopping to quote further we content ourselves with saying that the propositions contained in requests Nos. 3, 4, 5 and 6 so far as they state the law properly applicable to this case, were given in the charge.

Requests Nos. 7, 8, 9 and 10 are each based upon the claim that the plaintiff is to be treated as a manufacturer of the iron or else that the plaintiff was simply entitled to retain commissions on the iron sold, and each stated some proposition which we hold is not the law applicable to the case.

As to the other requests, so far as they state the law, applicable to the case, they were given in the charge.

Without stopping here to quote from the charge, an examination of it satisfies us that the court properly and clearly stated to the jury in the charge the law applicable to the case, including the proper rule for the measurement of damages.

The result is that we find no error in the record in this case which would justify a reversal and the judgment is affirmed.

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Hamilton County.

**REFUSAL TO MAKE DOW TAX A CHARGE UPON THE LAND.**

Court of Appeals for Hamilton County.

CHARLES E. ROTH, TREASURER, v. CAROLINE M. HULBERT ET AL.

Decided, March 22, 1913.

*Taxation—Action to Declare Dow Tax a Lien on the Premises—Failure of Proof as to Sales Having Been Made—Section 6080, General Code.*

A charge on the tax duplicate of an unpaid balance of Dow-Aiken tax will not be declared a lien on the premises occupied by the party who is alleged to have trafficked in intoxicating liquors, where the only testimony as to liquor having been sold on the premises sought to be so charged was given by two inspectors of the state dairy and food department whose testimony was so vague and uncertain that the trial court refused to believe it.

*Charles A. Groom*, Assistant Prosecuting Attorney, for plaintiff in error.

*DeCamp & Sutphin*, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

This is an action to enjoin the collection of the unpaid balance of \$180.04 tax for trafficking in intoxicating liquors by Helen Ray, in real estate owned by plaintiffs below and rented by her as a residence from month to month.

Reliance is placed by defendants on the tax charge standing upon the Dow-Aiken duplicate (in which the owner of real estate is listed "W. P. Hulbert Estate," Rec., 38) as making a *prima facie* case in their favor. It appears, however, that this charge was placed upon the duplicate by certification from the Auditor of State, and that his action was solely based upon the reports of two inspectors in the state dairy and food commissioner's department. Each of these inspectors testified that he went with a woman to this house and succeeded in purchasing beer, which they drank. There is no confirmation of this testimony by the woman companion or any one else, nor is there any denial by the tenant in the house of her servants, none of whom were called. There is, however, testimony of the real estate

manager, rent collector, workmen engaged in sundry repairs to the building, and a man who collected the money from a musical instrument operated by coins, all of whom were at the house at irregular times and intervals sufficient to have seen some evidence of a regular trafficking in liquor, if such had been conducted, and who failed to see any indications of such sales.

While we agree that in some instances a single sale or two such sales may constitute trafficking and that the knowledge of such sales by the tenant on the part of the landlord is not necessary to create a lien on the real estate, yet in this case the charge depends entirely upon the evidence of the inspectors, who showed by their unfamiliarity with the location and appearance of the premises and the identification of the tenant in their cross-examination, a lack of certainty that should not exist in evidence necessary to create such a lien as against property owners who have exercised the care in the management of property shown this case.

The character and weight to be given to this class of testimony has been passed upon and discussed in *Foley v. Roth*, 13 C.C. (N.S.), 318, and 8 N.P. (N.S.), 425; *King v. Richardson*, 9 N.P. (N.S.), 209; *Hall v. Roth*, 9 N.P. (N.S.), 215, and we are content with the rulings there made.

The trial court below had the advantage of seeing these inspectors as witnesses upon the stand and noting their demeanor and evidently gave no credence to their testimony. We are not disposed to view it in any more favorable light when we have no such opportunity.

We find no errors in the proceedings below and the judgment is therefore affirmed.

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Stark County.

**UNCERTAINTY AS TO THE MEANING OF THE WORDS "COMPLETE AUTOMATIC SPRINKLING SYSTEM."**

Circuit Court of Stark County.

**THE W. H. HOOVER COMPANY V. THE NIAGARA FIRE  
EXTINGUISHER COMPANY.**

Decided, February 21, 1910.

*Contract—Ambiguity—Extrinsic Evidence.*

In a written contract to install "a complete automatic sprinkler system such as will be satisfactory to the stock insurance companies, and when completed will meet strictly with their approval," the work to be "completed in accordance with the requirements of the Ohio Inspection Bureau," there is an ambiguity which authorizes extrinsic evidence as to the meaning of the word "complete."

*McCarty & Pontius, for plaintiff.**Turner & Webber and Orlando Wilcox, contra.*

MARVIN, J. (of the Eighth Circuit); TAGGART, J., and DONAHUE, J., concur.

The relation of the parties here is the reverse of their relation in the court of common pleas. The terms plaintiff and defendant as used in this opinion, will refer to the parties as they stood in the court below. Each of the parties is a corporation.

On the 24th day of March, 1906, a contract in writing was entered into between the parties, whereby the plaintiff undertook to equip the manufacturing plant of the defendant with an approved wet pipe system of the Niagara sprinklers and fire extinguishing apparatus, for which the defendant agreed to pay the sum of \$5,500. The contract provided among other things, that this sum of \$5,500 should be "in full for work and materials, as specified herein, including surveys, preparation of plans, board and car fare for men, and the final payment shall be due and payable thirty days after the work is completed, in accordance with the requirements of Ohio Inspection Bureau, under whose rules and regulations the work is to be performed."

The specifications made a part of the contract, contained the following clauses, among other things:

"The foregoing proposition is based upon furnishing and erecting the necessary number of automatic sprinklers in your plant located at New Berlin, Ohio, together with all pipe, fittings, valves, gauges, clips, hangers and labor necessary to erect the same in strict accordance with the requirements of the Ohio Inspection Bureau. \* \* \* It is understood under this agreement that you (meaning the defendant) are to do all excavating and backfilling of trenches, and any carpenter and masonry work, and furnish piers for tank. Otherwise, we are to install a complete automatic sprinkling system, such as will be satisfactory to the stock insurance companies, and when completed will meet strictly with their approval."

The plaintiff put into the manufacturing plant of the defendant a system of Niagara sprinklers and fire extinguishing apparatus which was to the satisfaction of the stock insurance companies and to the inspection bureau, and claims to have fully performed the contract on its part to be performed. The defendant by its answer, denies that the plaintiff has put in a *complete* automatic sprinkling system, and avers that the fact is that it is such system, when complete, and would have included all that which was put in, together with an electric alarm system, and that no such "electric system" was put in. Aside from this, there is no disagreement between the parties.

The contract entered into was upon a printed form prepared by the plaintiff, to which was annexed the specifications, from which quotations have been made. This printed form consists of a proposition made by the plaintiff to the defendant, and accepted by it. The specifications are typewritten. It developed upon the trial that on the 17th of March, 1906, the plaintiff had made a similar proposition to the defendant at a different price, to-wit, \$6,000, which was not accepted by the defendant. The defendant placed upon the stand W. H. Hoover, who was its president and general manager, and who acted for it in the making of the contract sued upon. He testified that he had a conversation with Mr. Frazer, manager of the plaintiff at the time the contract was entered into, and then he was asked this question:

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“Q. In that conversation did you call his attention to the fact that there was no itemized statement in this proposition of March 24th similar to the one set out in the proposition of March 17th?”

This question was objected to; the objection sustained, and an exception taken by the defendant. And the defendant's counsel stated that he expected the answer to be that the witness called Mr. Frazer's attention to the fact that in the proposition of March 17th there was an itemized list of the various things that were to make up said system complete, and that in the proposition of March 24th, there was no such itemized list.

This question was then asked of the witness:

“Q. I will ask you if at that time, before the signing of the contract, you asked Mr. Frazer what this proposition, which was not itemized, and which is incorporated into the contract of March 24th, included?”

“A. I did.

“Q. What did he say?”

This question was objected to; the objection sustained, and an exception taken by the defendant, and the defendant's counsel stated that he expected the witness to say, in answer to this question, that Mr. Frazer, who represented the plaintiff in the transaction, said that the proposition included in the contract of March 24th was the same, and included all the work and material the same as that set out in the proposition of March 17th; that it was their flat form of contract, and that it included everything that was itemized in the form marked “Defendant's Exhibit A” (this Defendant's Exhibit A being the proposition which the defendant claimed was made to it on the 17th day of March).

Counsel for the defendant then said, “in connection with the testimony of this witness, the defendant offers the proposition, or blank contract of March 17, 1906, heretofore marked as its “Exhibit A.” Objection to this was sustained and an exception taken by the defendant.

If there was any error for which the defendant can properly complain in the trial of this case, it was the ruling of the court

upon the several questions, and offers made by the defendant, shown in the foregoing. On the part of the plaintiff in error it is urged that this should have been admitted because it would have explained what the plaintiff meant or represented to the defendant that it meant by the words used in the contract actually entered into when it said "otherwise we are to install complete automatic sprinkling system." The word "otherwise" as here used is so used because immediately preceding it the defendant was to do certain work. This is seen by the quotation heretofore made of the clause preceding the word "otherwise." So then, except as to the things which the defendant was to do and which precede in the specifications the word "otherwise," the plaintiff was to install "a complete automatic sprinkling system." It is said that what constitutes "a complete automatic sprinkling system" would not be understandable necessarily by an intelligent man, without some explanation, and that such explanation was furnished by the plaintiff, as would appear if the witness had been permitted to answer that when he asked Frazer what was included in it, he answered, that it included all that was included in the proposition of March 17, and if the court had then permitted the proposition of March 17 in evidence, the words "complete automatic sprinkling system" would, it is claimed, have been fully explained. The specifications attached to the proposition of March 17th contain these words:

"The foregoing proposition is based upon furnishing and erecting 725 automatic sprinklers in your plant located at New Berlin, Ohio, together with all pipe, fitting, valves, guages, clips hangers and labor necessary to erect the same in strict accordance with the requirements of the Ohio Inspection Bureau. We further estimate that it will require." (Then follow twelve items of equipment, one of which is an "electric alarm system.")

But for certain words contained in the contract actually made, and also contained in the proposition of March 17th it would seem as though there could be little doubt that the defendant was entitled to show what he offered to show, that the plaintiff said at the time the contract was entered into that the complete system included the items named in the specifications

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attached to the proposition of March 17th. Certainly it can not be claimed that the words "complete automatic sprinkling system" convey a distinct idea to one not familiar with the system. In other words, there is an ambiguity in these words. To no member of this bench does it convey a distinct idea of what would be necessary to make such complete automatic sprinkling system. But, on the part of the plaintiff, it is urged that when the entire clause is read in which the words occur, "complete automatic sprinkling system" it will be seen that an arbitrator was determined upon in the contract, who should decide that question. The entire paragraph reads: "We are to install a complete automatic sprinkling system such as will be satisfactory to the stock insurance companies, and when completed will meet strictly with their approval." And in the printed proposition already quoted, the agreement is that the work is to be "completed in accordance with the requirements of Ohio Inspection Bureau." The trial court evidently regarded this contention on the part of the plaintiff as sound, and in the argument of plaintiff and in briefs furnished by its counsel, abundant authority is cited to show that where parties determine upon one who is to decide whether the contract is completed, such decision is final. But is that fairly applicable to the case here? The plaintiff was to put in a "complete system" and it was to be a "Niagara System."

It would hardly be contended that if any system other than the Niagara System had been put in, it would have been a fulfillment on the part of the plaintiff of its obligations under the contract, although such system should be to the entire satisfaction of the "Ohio Inspection Bureau," and meet entire satisfaction of the "stock insurance companies." The insurance companies and the inspection bureau are interested only in having such a system as will properly secure the premises from danger by fire. It certainly is conceivable that a system of fire extinguishers might be installed which would meet with the entire approval of the inspection bureau and the insurance companies, which would not be a "complete automatic sprinkling system" of the Niagara pattern.

Suppose A should contract to furnish B a complete McCormick harvester machine, to the satisfaction of the man in the

charge of B's farm, and A should furnish not a McCormick but a Deering Harvester machine, and such Deering machine was to the entire satisfaction of the man in charge of B's farm, it surely could not be claimed that A had performed his contract. The machine was not only to be to the satisfaction of the man in charge of B's farm, but it was to be a McCormick machine.

Suppose A undertakes to furnish B a complete harvesting machine to the complete satisfaction of the man in charge of B's farm, and B not himself being familiar with such machinery or its use, inquires of A what that includes, and he answers, either in writing or by word of mouth, that it includes an Appleby automatic binding attachment. A machine is furnished to the entire satisfaction of the man in charge of B's farm but it has no Appleby automatic binding attachment. It would seem as though there could be no doubt that A has not fulfilled his contract.

Suppose that A agrees to furnish B a certain span of horses and a carriage, with all the necessary attachments to the satisfaction of B's coachman. B inquires what is included in that complete carriage, and A answers, it includes among other things, a pole and shafts. A delivers the horses and the carriage with the pole and no shafts. It is entirely satisfactory to B's coachman. Has A fulfilled his contract? It would seem as though this question answered itself.

Suppose that at the time of the contract being entered into there had been present some of the appliances constituting a part of the apparatus, which appliances were made of brass, and which if made of iron would be equally satisfactory as they well might be, to the insurance companies and the inspection bureau, and the defendant had asked of what material are these particular appliances to be made when you put in a "complete automatic sprinkling system" of the Niagara pattern, and the answer had been, "They are always of brass." The system when put in, has several appliances of iron or some other material much cheaper than brass. They are equally satisfactory to the insurance companies and the inspection bureau, but could it be claimed that the plaintiff having said, either in writing or by word of mouth, that their completed system included these ap-

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pliances made of brass, that the contract had been complied with? This seems to answer itself. In short, a fair construction of this contract would seem to require that the work and the materials should be satisfactory to the insurance companies and the inspection bureau, but that the fact that they were so satisfactory was not necessarily *all* that was required, but that such contract might include something else. We think the court clearly erred in excluding the evidence to which attention was called, which was offered by the defendant. We therefore hold that this evidence should have been admitted as explaining what the plaintiff represented to the defendant was meant by the Niagara sprinkling and fire extinguishing apparatus, and a "complete automatic sprinkling system," and for error in excluding this evidence, the judgment is reversed and the cause remanded.

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**CONTINGENT RIGHT OF DOWER NOT RELEASED  
BY DIVORCE.**

Circuit Court of Summit County.

DON A. GOODWIN V. MILDRED GOODWIN.

Decided, April 12, 1911.

*Alimony—Dower Not Released by Divorce for Husband's Aggressions—  
Election to Receive Money in Lieu Thereof.*

The contingent right of a wife, during her husband's life, to be endowed of his real estate at his death is property, and the property right is not lost by her by divorce from him on his aggressions, unless she voluntarily release the same and agree to take a money consideration in lieu thereof, which, in an alimony case, may be awarded her upon her election.

*Grant, Sieber & Mather, for plaintiff in error.*

*Otis, Beery & Otis and G. M. Anderson, contra.*

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The defendant in this action was divorced from the plaintiff by reason of his aggressions. The defendant not being content

with the order in reference to alimony, comes to this court by appeal from that part of the decree.

The evidence shows that the parties lived together as husband and wife but a short time; that both had been married and both divorced before their marriage to each other. The defendant is now about 38 years of age, and though there is no evidence as to the age of the plaintiff, it does appear that they were acquainted as children, and from his appearance on the stand we reach the conclusion that he is a few years, and only a few years, the senior of the defendant. It is perhaps not profitable that we should spend any considerable time in the discussion of the obligations which each of these parties took to the other at the time of the marriage. The law imposes duties upon each, and gives rights to each. When the plaintiff married the defendant he undertook to provide for her in such wise as one in his circumstances and with surroundings should provide for his wife. And further he conferred upon her by the very act of marriage the right to be endowed of all the real estate of which he should be seized at any time during the coverture, provided she outlived him. This right, though inchoate, is still spoken of and declared by the courts of Ohio to be a property right. In the case of *Mandell v. McClave*, 48 Ohio St., 407, it is said in the syllabus:

“The contingent right of a wife, during her husband’s life, to be endowed of his real estate at his death, is proper, having a substantial value that may be ascertained with reasonable certainty from established tables of mortality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively.”

The evidence shows that the husband is the owner of real estate which is worth, above the mortgage encumbrances upon it (which encumbrances we assume to have been upon it at the time the parties hereto were married), about \$80,000. He has a considerable amount of personal property, but probably not sufficient to pay all of his debts, including this mortgage debt. This contingent right of dower, estimated by the tables, and assuming the husband to be 40 years of age, is worth about \$3,200. The decree of divorce in this case could not deprive the defendant

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of that right, so she still has it. If she chooses to relinquish it for its fair value in money she may do so, but it is no part of the duty of this court to determine that she shall, and without going further into the reasons for the allowance made, it will be the order of the court that the plaintiff pay to the defendant the sum of \$1,800 as alimony, and that if she chooses to, and she releases her right to dower in his real estate, he shall pay her the additional sum of \$3,200; so that in any event she shall receive \$1,800 and it will be at her election whether she will release her dower and receive \$5,000.

This decree for alimony will constitute a lien upon the real estate of the plaintiff until it is paid, and in the event that the defendant shall elect to release her claim for dower to the plaintiff, such release shall not operate to discharge such real estate from any part of the lien created by this decree.

#### NEGLIGENCE ON THE PART OF A DRIVER.

Circuit Court of Cuyahoga County.

#### LUDWIG SPIELBERGER V. THE NORTHERN OHIO TRACTION & LIGHT COMPANY.

Decided, October 12, 1910.

*Street Car Accident—Driver Crossing Track—No Time to Stop Car—  
Company Not Liable.*

Where a person with knowledge that a street car is coming rapidly, drives upon the track and his hind wheel is struck before he clears the track and he is injured, there being no evidence that the motorman had time to stop his car in time to save the accident, there can be no recovery against the street car company.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

From this record it appears that a verdict for the defendant below was directed at the close of plaintiff's evidence in an action to recover damages for personal injuries sustained by the plaintiff, a groceryman, the hind wheel of whose delivery wagon was struck by a street car as he was driving across Main street

in the city of Akron on the morning of November 27th, 1907. The only negligence of the defendant which the plaintiff in error now relies on is that the mortorman had time, after notice of the danger, to prevent the collision.

Spielberger himself testified (pp. 6-8), "When I got on Main I looked around the north side, did not see anything, looked around south and it was about 300 feet away from the crossing from where I was going to cross the track." Being asked "And at the time you saw the car 300 feet away how close was your horse to the track that the car was coming on?" he answered, "About 10 or 15 feet."

Question. "What did you do then when you saw the car coming and you was that close to the track, what did you do?" Answer. "Well, I started, I drove ahead, I drove on because I seen—" Question (interrupting). "You drove where?" Answer. "West." Question. "Across the track?" Answer. "Across the track." Question. "And as you was crossing the track state what, if anything, happened?" Answer. "I seen the car was pretty close to me and I jacked up the horse, tried to jack up the horse after they didn't stop, they didn't stop, they didn't ring the bell, didn't stop nor nothing, just coming ahead, hit my hind wheels, upset the wagon, I dropped down then, that was my last."

The wagon it appears was slowly toppled over, and the car come to a standstill within half or three-quarters of its own length after hitting the wagon (p. 80). Another witness says (p. 82) that plaintiff's horse was ten or twelve feet from the track when the car was coming within 150 feet of him." The plaintiff below also proved (pp. 104-5) that, at ten miles an hour, the shortest distance in which this car could be stopped at that place, is 150 or 175 feet, with perfect conditions; and at 16 miles an hour, 250 feet. The speed limit under city ordinance was then 12 miles an hour, but it nowhere appears how fast this car was going.

Upon this state of evidence we think the court below was clearly right in holding that there was nothing for the jury to consider. The only negligence discernible from the record is that of the plaintiff in error.

Judgment affirmed.

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Champaign County.

**WILFUL AND WANTON NEGLIGENCE.**

Court of Appeals for Champaign County.

**NYPANO RAILROAD COMPANY AND ERIE RAILROAD COMPANY v.  
LEROY L. BLOSE AND HENRY HEATER, ADMINISTRATORS  
OF THE ESTATE OF AUGUSTUS MAUCK, DECEASED.\***

Decided, February 26, 1914.

*Carriage Struck by Train at Street Crossing—Reckless and Wanton  
Negligence Charged Against Railway Company—Doctrine of Last  
Clear Chance Not Applicable, When—Weight of Evidence.*

In an action growing out of the striking of a vehicle by a steam railway train, running forty miles an hour over a street crossing within municipal limits, where the view of the track to the occupants of the vehicle was obscured by a string of freight cars, and when the street is also in part obstructed by cars standing thereon a jury is justified in finding that the train was being operated in such a manner as to amount to wilful and wanton negligence.

*I. T. Siddall and S. S. Deaton, for plaintiffs in error.*

*L. D. Johnson and Buroker & Zimmer, contra. \**

**KUNKLE, J.; ALLREAD, J., and FERNEDING, J., concur.**

The court of common pleas upon the original trial of this case directed the jury to return a verdict in favor of plaintiffs in error.

Error was prosecuted from such judgment to the circuit court, which court, in an opinion delivered by Judge Sullivan, held that the case should have been submitted to a jury for its consideration and such court reversed the judgment of the common pleas court.

The judgment of the circuit court was affirmed by the Supreme Court without opinion and the cause was remanded to the common pleas court for re-trial.

The case was re-tried and submitted to a jury in the common pleas court in December, 1912.

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\*Writ of certiorari denied by the Supreme Court, February 10, 1914

The jury rendered a verdict in favor of defendants in error for \$4,000. Motion for a new trial having been overruled, error is prosecuted to this court.

Since the case was heard in the circuit court, the petition has been amended by adding an additional ground of negligence, viz: "that the defendants further obstructed said Bloomfield avenue, on the south side thereof, by cars standing out on the avenue so that the full use of said avenue was obstructed and there was less room to pass through between the cars than there should have been."

Counsel have favored the court with unusually exhaustive briefs in this case. These briefs have been submitted to opposing counsel. We have considered the arguments contained therein, and have examined the authorities cited therein, but shall not attempt to discuss or review the same in detail.

Plaintiffs in error claim that the evidence does not establish any negligence in the respects claimed in the petition and that the verdict is manifestly against the weight of the evidence and is contrary to law.

There was a conflict in the evidence as to whether the whistle upon this engine was blown or the bell thereon rung, as the train was approaching this crossing. There was also a conflict in the evidence as to the rate of speed at which this train was running when it approached and crossed Bloomfield avenue.

It is sufficient for the purposes of this decision to state that the above were questions of fact, which were required to be and were properly submitted to the jury. The record shows that the jury was fully instructed by the trial court as to the rules by which such testimony should be weighed. The charge upon this subject concluded with the following statement:

"In such cases the question is purely for the jury, and the jury must determine it from a consideration of all the facts and circumstances in the evidence."

We think the manifest weight of the evidence shows that this train approached and passed over this crossing at practically forty miles an hour. Bloomfield avenue is a public street in the outskirts of the city of Urbana. While this crossing

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was not used to as great an extent as many other street crossings in that portion of the said city, yet the evidence discloses that this crossing was used by travelers to a considerable extent. We think the jury was justified in finding that the plaintiffs in error were guilty of negligence in passing over this crossing at the rate of speed at which it was crossed.

A number of witnesses testified as to whether the whistle on this engine was blown and whether the bell upon this engine was rung as the train approached said crossing. Some testified that the whistle was not so blown and that the bell was not so rung. A portion of the witnesses so testifying appear to have been in a position where they could have heard the same had the bell been rung or the whistle blown. Other witnesses called by the plaintiffs below stated that they did not hear the bell ring or the whistle blow, and the inference claimed from such testimony was that if the bell had been rung or the whistle had been sounded, these persons could and would have heard the same.

The defendants below called a number of witnesses who testified that the whistle was blown and the bell was rung for this crossing. As above suggested, these were questions of fact to be determined by the jury. If the jury believed the witnesses called by the defendants in error upon these questions of fact, then there was ample evidence to support a finding that the bell was not rung nor the whistle sounded at the time in question.

It also appears from the record that the plaintiffs in error at the time in question obstructed this crossing by standing freight cars thereon, so that the width of the crossing was thereby reduced to a width of about thirty feet, instead of being sixty feet, the width of the said avenue.

It appears from the testimony of Lawrence Zimmerman, who was the only eye-witness to this accident, that he saw Mr. Mauck driving through this opening in the cut of cars which plaintiffs in error had left standing in part upon Bloomfield avenue. He says that Mr. Mauck was trying to pull his horse to the south and the car standing on Bloomfield avenue to the south prevented his so doing. The record shows that the carriage in

which these people were riding was thrown against and under the car so standing on the south side of Bloomfield avenue, and that by reason thereof Mr. and Mrs. Mauck were killed and their daughter seriously injured. If this car had not been so unlawfully placed on Bloomfield avenue, the accident in question might have been avoided.

Mr. Zimmerman testified in part as follows:

"Q. Now, just tell the jury what happened after you first saw Mauck with his horse coming through that opening? A. Just as I saw him coming through the cut, the train hit him just as I saw him.

"Q. What was he doing? A. Pulling on the lines.

"Q. What direction was he pulling? A. South.

"Q. Do you know any reason why, when he pulled south, that he didn't get out of the way of the train?

"Objected to. Objection sustained.

"Q. When you saw him pulling—on the left, you say? A. Yes.

"Q. What was the condition there? A. Those cars stopped him.

"Q. What cars? A. The south range of cars.

"Q. Stopped him from what? A. Turning his horse around.

"Q. Now, when you saw the horse coming, was it trotting or walking? A. Walking."

The petition also charges that the defendants below "carelessly, recklessly and wantonly caused said locomotive to strike, wound and kill the said Augustus Mauck."

This branch of the case presents a very interesting question. In order that we may avoid any confusion as to the issues, it will not be amiss to again repeat that the petition charges that the defendants "carelessly, recklessly and wantonly caused the death of the said Mauck." What is known as the doctrine of the "last clear chance" is not plead in the petition and is not relied upon by counsel for defendants in error. Some of the authorities cited by counsel for plaintiffs in error relate to this doctrine. A portion of their oral argument was also devoted to showing that there can be no recovery, as it was conceded that the agents of the railroad company in charge of this train did not know of the peril of Mr. Mauck before he was injured, and it

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is claimed there can be no liability, as there was no testimony showing or tending to show that the agents of the railroad company could have avoided the accident after they learned of Mr. Mauck's peril.

If the defendants in error had relied for recovery upon the doctrine known as the "last clear chance," then before they could recover, it would have been incumbent upon them to show that the agents of the railroad company in charge of this train knew of the peril of Mr. Mauck and after having acquired such knowledge could by the exercise of ordinary care have avoided injuring him. As above stated, however, this doctrine is neither plead nor relied upon.

In addition to the acts of negligence above specifically referred to, the defendants in error also claimed that the railroad company obstructed Mr. Mauck's view of this train by the cars which were placed on another track—that Mr. Mauck's view was completely obstructed by such cars so placed by the railroad company.

We are satisfied from an examination of the record that the plaintiffs in error by this act materially obstructed Mr. Mauck's view of this approaching train.

In 76th Ohio State Reports, 176, our Supreme Court says:

"The rule upon the subject has been correctly stated to be that 'where the surroundings are such as to render a crossing particularly dangerous, it is the duty of the company to exercise care commensurate with the danger and especially if the company has created unusual danger at or near a crossing, it must meet such peril with additional precautions.' "

We are inclined to think, from an examination of the entire record, that the jury was justified in finding that the train in question was operated at the time and under all the circumstances in question, in such a manner as to amount to a wanton and wilful disregard of the rights of persons lawfully using this crossing. If the jury believed the testimony of certain witnesses of defendant in error then we think it was justified in finding that the acts complained of in the petition were done under such circumstances as that the natural and probable consequences of such acts would be to cause injury to others.

What acts constitute wilful and wanton disregard of the safety of others is very fully discussed in the case of *Atchinson, T & S. F. Railroad Company v. Baker, Admr.*, 21 L. R. A. (N.S.), 427, and in various other authorities cited by counsel.

If we are correct in our conclusion that the jury was warranted under the evidence in finding that the conduct of the agents of the railroad company at the time in question amounted to wilful and wanton negligence, then the plaintiffs in error can not escape liability on account of any contributory negligence on the part of Mr. Mauck—even assuming that he was negligent, and that his negligence contributed to his receiving the injuries complained of.

In the case above cited, the first paragraph of the syllabus is as follows:

“In an action to recover damages on account of an injury to a pedestrian resulting from a locomotive being driven along the public street of a city at an unlawful and dangerous rate of speed, with no signal being given of its approach, and with no outlook being kept, the misconduct of those in charge of it may amount to such recklessness and wantonness as to cut off the defense of contributory negligence, although such employees did not know of the presence of the person injured, if to their knowledge the extent to which the street was used made an injury so probable that they must be deemed to have realized its imminence, and to have refrained from taking steps to prevent it because they were indifferent whether it occurred or not.”

Counsel for defendants in error claim that there is no testimony showing negligence upon the part of Mr. Mauch; that it devolved upon the plaintiffs in error to prove their defense of contributory negligence; that in the absence of any testimony upon the question of Mauck's negligence the presumption is that he exercised ordinary care to protect himself from injury and was not guilty of negligence.

In view of the conclusion at which we have arrived, it is unnecessary to consider this question.

Plaintiffs in error also claim that the trial court erred in requiring the jury to stay out from 4:45 P. M., Saturday, until 2:30 A. M. Sunday morning. Our observation is that juries are

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often kept out not merely a portion of the night but throughout the entire night. There is nothing in the record which would justify us in finding that the plaintiffs in error were prejudiced by reason of the jurors being held until that hour of the morning.

Plaintiffs in error also complain of various questions which the trial court permitted the plaintiff below to ask different witnesses. A list of such questions has been handed to this court. We have examined the record, and while some of the questions referred to are somewhat leading and suggestive, yet that is a matter which rests in the sound discretion of the trial court. We do not find any prejudicial error in the respects suggested.

Plaintiffs in error also claim that the court erred in refusing to give certain instructions to the jury. The bill of exceptions shows that after the court had concluded its charge to the jury the defendant excepted to the general charge of the court and asked the court to give certain further instructions to the jury. Assuming that the request for the charges in question was properly made, we have examined such requests to charge, and think they were properly refused. The charges requested had in part already been given in substance in the general charge of the court.

Finding no error in the record, prejudicial to the plaintiffs in error, the judgment of the lower court will be affirmed.

**THE TAKING POSSESSION OF MORTGAGED CHATTELS.**

Circuit Court of Lorain County.

**ANDREW MCQUATE V. THOMAS SMITH.**

Decided, April 26, 1911.

*Chattel Mortgage—Mortgagee's Right to Take Possession—Replevin—Issue that Mortgagee Injured Property and Sold it for Less Than it Was Worth.*

1. The rightful exercise by a mortgagee of chattels to take possession of them, under a covenant in the mortgage that he may do so if he at any time before the money becomes due, deems it necessary for his more complete and perfect security, does not depend upon the fact that he has reasonable grounds for deeming it necessary for his security.
2. An averment in a cross-petition in replevin that the plaintiff, during his possession of the replevined property failed to properly care and provide for it and permitted it to greatly depreciate and injured the same, and thereafter sold it at public auction for less than its value, presents an issue which must be determined by a jury.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Smith brought replevin before a justice of the peace against McQuate to recover possession of a team of horses and a set of double harness. On appeal of the action to the court of common pleas, Smith filed his petition, briefly alleging that he was entitled to the immediate possession of said chattels and of fifty dollars damages for its unlawful detention.

McQuate's answer and cross-petition alleges that he had mortgaged said property to Smith to secure his note for \$175.65, which was not yet due. The mortgage, attached to and made a part of the answer, provides that "if the said grantee, his heirs, or assigns, shall at any time before said sum of money becomes due, deem it necessary for his or their more complete and perfect security, the said grantee, his heirs and assigns, are hereby authorized and empowered with or without the aid and assistance of any persons or person, to enter the dwelling-house, store or other premises of said grantor, or such other places as

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the said goods or chattles are or may be placed, and take and carry away said mortgaged property, and sell and dispose of the same at public auction or private sales, at once, without notice, and out of the money arising therefrom to retain and pay the said indebtedness above mentioned, and all charges touching the same, etc.

The answer and cross-petition further alleged:

"Defendant further says that on or about the 9th day of August, 1910, said plaintiff, pretending to act under said mortgage, and without any just cause or excuse and without any default made in the conditions of said mortgage by this defendant and in violation and contrary to the expressed terms and the true intent and meaning of the said mortgage, forcibly took possession of said property and converted the same to his own use against the will and protest of this defendant.

"Defendant alleges that none of the conditions of said mortgage were broken by him, and that after the giving of said mortgage he had done or suffered to be done no act, nor was he about to do or suffer to be done any act, nor had he in contemplation the doing or suffering of any act, which would tend in any manner to impair the security of the said mortgage or to give plaintiff any reasonable or probable cause to apprehend the loss or impairment of his said claim against defendant or said mortgage security."

This does not amount to an allegation that Smith did not deem it necessary for his more complete and perfect security to take the property and sell it, as the mortgage permitted him to do. As said in *Francisco v. Ryan*, 54 Ohio St., 308, 320, "The rightful exercise of that authority does not depend upon the fact that he has reasonable grounds for deeming it necessary for his security." In other words, the answer and cross-petition does not adequately deny the averment of the petition that plaintiff was "entitled to the immediate possession" of the property. The defendant having failed to join issue by answer traversing the petition's allegation in this behalf, the averments of the reply and of the so-called replication upon the subject are immaterial so far then as the plaintiff's cause of action is concerned, the court below reasoned rightly in granting his motion for judgment on the pleadings.

The cross-petition alleges, however, that the plaintiff after taking the horses and harness, and during his possession, failed to properly care and provide for said property and permitted same to greatly depreciate and injured the same. The defendant further alleges that plaintiff thereafter caused said property to be sold at public auction "for \$187 being less than its value." These averments are denied by the reply, and the issue of fact thus joined presented a case for trial upon evidence such as to preclude judgment on the pleadings. For error in rendering such judgment, therefore, the same is reversed and the cause remanded.

#### **PROCEEDINGS IN ATTACHMENT.**

Circuit Court of Lorain County.

**NICHOLS BROTHERS v. CHARLES KOSHINICK, ALIAS KOSTI NICK.**

Decided, April 26, 1911.

*Attachment—Motion to Discharge on Ground Property is Claimed by Another—Judgment Against Infant Personally Served, Not Void, But Reviewable.*

1. Upon a claim of ownership of attached property by a person other than the defendant, an order restoring the property to the claimant may be made, but it is erroneous to discharge the attachment because of such claim.
2. A judgment against an infant defendant, sued personally, is not void, but will remain subject to review until a sufficient time after removal of the disability of infancy shall have elapsed to bar such review.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Nichols Brothers sued Charles Koshinick before a justice of the peace upon an account, and on the same day garnisheed the Deen Electric Company. Default judgment was rendered for the plaintiff November 17, 1909, but the garnishee not having answered, no order was made against it. Two days later Charles Nick filed his motion to discharge the attachment, and this motion upon being heard, was granted.

. There is no express authority of law for entertaining such motion filed by the defendant after judgment. Revised Statutes, 6522; General Code, 10297, provides only for the filing of such motion by the defendant before judgment. We incline to believe, though it is unnecessary now to hold, that the judgment meant is the judgment on the merits in principal action and not the order or judgment, if any, against the garnishee. The motion itself, however, alleges that Charles Nick, who filed it, "is not the above named defendant." On the hearing of this motion, Charles Nick gives evidence tending to show that it was his father, Kostj Nick, who incurred the debt, whereas the wages attached were earned by the witness, who is the minor son of said Kostj Nick.

Considered as a claim of ownership of the attached property by a person other than the defendant, the motion was triable as if "the property had been seized upon execution issued by the justice of the peace and claimed by a third person" (Revised Statute, 6509; General Code, 10283). And the right of property was thus tried substantially in accordance with Revised Statutes, 6573-6575; General Code, 10371-10373.

The boy, it appears, had been doing business upon his own account to some extent, but there is no sufficient evidence of emancipation to warrant the court in finding that the wages he had earned were not the property of his father. Even if the justice had been warranted in so finding, the judgment should not have been a discharge of the attachment, but an order restoring to the claimant his property erroneously detained by the garnishee as that of the defendant. The garnishee being in default for answer, it might, for aught appearing to the contrary, have been detaining not only the boy's wages but also money due the father. If so, the attachment being regular, it was improper to discharge it.

There is much confusion in the record as to whether the boy or his father was the real defendant in the original action. The constable's return recites personal service of the summons upon the defendant. The boy testifies that the summons was handed by the constable to him and not to his father, who had just left on a visit to Europe. But the constable, he says, told him to

send it to his father. The bill of exceptions, prepared by Nichols Brothers and certified by the justice, alleges that the said motion was interposed by the defendant, and that on the trial thereof he offered himself as a witness. The style of the original action was Nichols Brothers vs. Chas. Koshinick, alias Kosti Nick, and though the boy's name is Charles Nick and the father's Kosti Nick it is not certain that the former was not meant. The boy testifies that Nichols Bros. claimed that he was the one indebted to them. If they intended to sue the boy, the action was irregular in that the defendant was an infant, sued personally, without guardian. But the judgment is not therefore void, though it will remain subject to review until a sufficient time after the removal of the disability of infancy shall have elapsed to bar such review.

In any event the judgment of the justice discharging the attachment, and that of the common pleas court in affirmance therefor, were erroneous, and the same must be set aside and the cause remanded to the latter court. Proceeding therefore to render the judgment which the court of common pleas should have rendered, the judgment of the justice of the peace discharging the attachment is reversed because it is contrary to law and the evidence, and the cause will be retained in the common pleas for retrial.

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**CORPORATION AND ITS OFFICERS HELD LIABLE ON A NOTE.**

Circuit Court of Lorain County.

**THE HURON COUNTY BANKING COMPANY V. THE OBERLIN COMPANY, J. C. HILL AND ALBERT E. HAY.**

Decided, April 26, 1911.

*Promissory Note Signed by Corporation Name and Officers Names—Officers Liable, When.*

When the words "we or either of us" and other kindred phrases appear in the body of a promissory note, signed by the proper officers of a corporation in the corporate name, but underneath the corporate name said officers sign their own names, though they affix thereto their appropriate official titles as such officers, the note will be construed as the note of the corporation and of said officers, as individuals. *Aunget v. Oregue*, 72 O. S., 551, distinguished.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The parties stand here as they stood below. There the court sustained the demurrer of the defendants Hill and Hay to the petition of the plaintiff praying personal judgments against each of them as well as the Oberlin Gas & Electric Company upon a promissory note as follows:

"\$2,500.00 OBERLIN, OHIO, DECEMBER 29, 1909.

"Four months after date, for value received, We or either of us, promise to pay to the Huron County Banking Company of Norwalk, Ohio, or order, at its banking office, twenty-five hundred and 00-100—dollars, with interest at the rate of 7 per cent. per annum, payable semiannually, having deposited with said banking company the following described property, to-wit: eight (8) first Consolidated 6 per cent. Mortgage Bonds of the Oberlin Gas & Electric Company par value \$500 each; same being Nos. 329-336 inc.—as collateral security for the payment of the above indebtedness of the undersigned to said banking company. The extension of the time of payment or renewal of the indebtedness evidenced by this note, shall in no way release the undersigned or either of them, or the collateral security above described, or any substituted or additional security which may be furnished; and we, or either of us, hereby agree to deposit with said banking company, upon its demand, such additional collateral security

as said banking company may from time to time require. On the non-performance of the foregoing conditions, provisions and agreements as to furnishing additional collateral, or upon the non-payment of the above mentioned liability, then and in either case, we or either of us hereby authorize and empower the said banking company to sell, assign and deliver the whole or any part of the above securities or any substitutes therefor, or any additions thereto at any brokers' board or at public or private sale at the opinion of said banking company or of any one or more of its officers without either public advertisement or personal notice to us or either of us, both of which are hereby expressly waived. If said securities are sold at public sale the said banking company may itself purchase the whole or any part thereof, free from all rights of redemption on the part of us or either of us, which right is hereby waived and released; and after deducting all legal and other costs and expenses for collection, sale and delivery of said securities, the residue of the proceeds of such sale or sales so made shall be applied upon the payment of the above liability; the overplus, if any, to be paid to us, or either of us.

“THE OBERLIN GAS & ELECTRIC CO.,

“J. C. HILL, PRESIDENT,

“ALBERT E. HAY, TREASURER.”

There are no endorsements nor credits upon said note.

We hold that the words “or either of us,” and other kindred phrases in the body of this note, distinguish this case from that of *Aungst v. Creque*, 72 Ohio St., 551, which decided that:

“But where a promissory note is signed by the proper officer of a corporation in the corporate name, and underneath the corporate name he signs his own name, affixing thereto his appropriate official title as an officer of said corporation, in the absence of anything in the body of the instrument requiring a different construction, such note will be construed and held to be the note of the corporation only, and not the note of the officer so signing, or the joint note of such officer and the corporation.”

Judgment reversed for error in sustaining demurrer, and cause remanded.

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Coshocton County.

**PASSENGER INJURED WHILE WAITING FOR TRAIN.**

Circuit Court for Coshocton County.

**CURTIS E. SMITH v. THE PITTSBURGH, CINCINNATI, CHICAGO &  
ST. LOUIS RAILWAY COMPANY.\***

Decided, November Term, 1911.

*Negligence—Duty of Passenger While on Railway Company's Premises  
—No Recovery for Injury from Being Struck by a Train, When.*

An intending passenger waiting the arrival of his train is bound to use reasonable care for his own safety while on the company's premises, and he is guilty of contributory negligence which bars recovery for injuries from being struck by a train, when he attempts to pass from one waiting platform to another and in so doing crosses a track without looking to see whether there is a train approaching.

*Anderson & Anderson*, for plaintiff in error.  
*Frank E. Pomerene*, contra.

**SHIELDS, J.; VOORHEES, J., and POWELL, J., concur.**

This is a proceeding in error to reverse the judgment of the court of common pleas of this county in an action brought by Curtis E. Smith against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to recover for personal injuries claimed to have been sustained by him by reason of the negligence of the defendant company.

The plaintiff in error complains of the action of the court below in several respects, as appears in his petition in error filed herein for the reversal of said judgment, but the principal error complained of, and which alone was argued to this court, is that said court erred in directing the jury to return a verdict for the defendant company, at the close of the plaintiff's testimony, upon the motion of the defendant company, because the plaintiff's testimony failed to show negligence upon the part of the defendant company, and because said testimony clearly

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\*Affirmed by the Supreme Court without opinion, *Smith v. P., C., C. & St. L. Railway Co.*, 88 Ohio State, 586.

showed negligence on the part of the plaintiff which directly contributed to his injuries.

From the record in this case it appears that railroad tracks were located on either side of the defendant company's passenger station at Carnegie, Pennsylvania, where the accident resulting in the plaintiff's injuries occurred; that the tracks on the north side of said station were used by the trains of the defendant company running to and from Pittsburgh, Pennsylvania, from Carnegie and to points beyond; that two platforms were constructed about said station, on the north side thereof, for the convenience and accommodation of passengers taking passage on said trains—one immediately up to and along the side of said station, running several feet eastwardly, and extending in width close to the inner rail of the first of said tracks nearest to said station, and the other between the second and third rails of said tracks running parallel with said first described platform, and for about the same distance; that a plank walk was also constructed between said named platforms, running north and south; that the plaintiff below was at said company's station on the day of said accident and procured transportation from Carnegie to Pittsburgh; that at said time and place there was present on and about said platforms and in and about said station a large number of people; that about the time the train which said plaintiff intended taking for Pittsburgh was due at Carnegie, and was approaching said station, he hastily made his way through the throng of people assembled on said first named platform, for the purpose of crossing over said plank walk to said second platform, to enable him to go aboard said train from that place, supposing and believing, as he testified, that said train would enter and stop upon the tracks immediately north of said second described platform, at said station, and in so doing the pilot on the engine attached to said approaching and moving train struck him, causing the injuries complained of.

An examination of the record in this case shows that the plaintiff below was not a total stranger to the surroundings about said station, and while, perhaps, it can not be said he was fa-

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miliar with them, he testified that he had b-e-f-r-e that time taken passage on the defendant company's trains several times from said station to Pittsburgh, so that he had some knowledge of the location of the tracks and property conditions in and about said station.

Counsel for plaintiff in error contend that the testimony shows that the plaintiff in error, in attempting to cross over said plank walk between the said platforms, believed it was necessary for him to do so, that he might enter a car of said train from the second named platform. If such was his belief it was a mistaken belief, for the testimony shows that the defendant company's trains running to Pittsburgh, ordinarily at least, approached said station upon the tracks south of said platform, and not north of it, and the plaintiff's own testimony leaves the matter in no little doubt as to what he himself thought in this respect, for he testified that he entered said company's cars in going to Pittsburgh sometimes from one platform, and at other times from another.

But aside from this phase of the case, connected as it is with the implied invitation of the company for its passengers to cross over on said plank walk to the second platform to take passage on the trains, it is contended by the plaintiff in error that said company was guilty of negligence in not signaling its approach to said station by ringing the bell and sounding the whistle on the engine attached to said train. While we recognize that the failure to do this might be such negligence as to subject the said company to liability, under certain conditions, in case of an accident, and if in the exercise of ordinary care it was necessary to do so, even as a precautionary measure for the safety of the people gathered in and about said station, and assuming that said company, through its employees, in charge of said train, was negligent in this respect, the inquiry arises as to whether the plaintiff in error was free from fault? While said company, in the exercise of ordinary care, was required to provide and maintain such accommodations at said station as were reasonably safe and adequate to protect him against accident and danger, it was likewise incumbent upon the plaintiff in error to use like

care for his own safety. What does the record disclose in this respect?

By referring to pages 65 and 66 of the record, the plaintiff in error, on cross-examination, when interrogated upon the incidents immediately preceding the accident, testified as follows:

"Q. Do you still say that you couldn't have stood at the outer edge of the platform, where others were standing at the platform, and look down the track a piece? A. I could if I was on the track.

"Q. I mean before you stepped down on the track. A. I might if I had walked up and peeked out around.

"Q. Any difficulty in seeing a part of the way down the track? A. It isn't customary for people to do that.

"Q. Couldn't you have done that? A. I suppose I could.

"Q. There wasn't the slightest difficulty before you stepped down on the track? A. If I had stopped there somebody would have bumped against me or knocked me over. I have no right to blockade the way."

This testimony furnishes its own comment. The witness, if he did not see the approaching train before reaching the edge of the platform, knew it was about due, and yet with this knowledge, he attempted to pass over the crossing without looking for the train, as he testified, and was injured. Surely he could not with his eyes wide open walk into the presence of danger, for had he looked there was nothing to prevent him from seeing the approaching train, and then make a claim for damages against the company because the bell on its engine was not rung or the whistle sounded.

And so, too, if he could have seen the train and avoided the accident by the exercise of ordinary care on his part, he is not entitled to recover. And further, if before attempting to cross said walk leading from the first to the second platform, he was in such position as that he could have known and ought to have known of the approaching train and the danger confronting him, and with this knowledge undertook to cross said walk and was injured in so doing, he was guilty of such contributory negligence as would defeat his right to a recovery.

"A passenger awaiting the arrival of his train, is bound to use reasonable care for his own protection while on the com-

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pany's premises, and failing to do so will be denied a recovery in case of a resulting injury."

For the reasons stated, we think there was no error in the action of said common pleas court in directing the jury to return a verdict for the defendant below, and the judgment of said court will therefore be affirmed, with costs. Exceptions noted.

**PARTICIPATION OF MATERIAL MEN AND LABORERS UNDER A MECHANICS LIEN.**

Circuit Court of Lorain County.

**THE CLEVELAND TRUST COMPANY V. THE VILLAGE OF OBERLIN  
ET AL.**

Decided, April 26, 1911.

*Mechanic's Lien Law—Filing Sworn Statements with Owner and County Recorder—Effect of.*

Where a sub-contractor, material-man, laborer, or mechanic has, within four months from the furnishing of his material or labor, filed his sworn and itemized statement thereof as provided by Section 8324, General Code, and files a copy thereof with the county recorder, as required by Section 8326, General Code, all other sub-contractors, material-men, laborers and mechanics who file their statements within ten days thereafter, as provided by Section 8328, General Code, are thereby let in to participate in the fund, though more than four months have elapsed since their claims accrued.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Under General Code, Sections 8324 and 8328, relating to mechanics' liens and attested accounts, we hold that where a sub-contractor, material-man, laborer, or mechanic, has, within four months from the furnishing of his material or labor, filed his sworn and itemized statement thereof as provided, by the former section, and files a copy thereof with the county recorder as required by General Code, 8326, all other sub-contractors, material-men, laborers and mechanics, who file their statements

within ten days thereafter, as provided by General Code, 8328, are thereby let in to participate in the fund, though more than four months have elapsed since their claims accrued. The statutes in question, having, as we read them, expressly so provided, we are not at liberty to construe them otherwise.

Under General Code, 8334, the transfer of the avails of his contract, by the head contractor to the plaintiff here, is made subject to valid claims, of the sort above described, upon the fund in the hands of the defendant, and the plaintiff is entitled to nothing until those claims are paid. So also the assignee in insolvency of the head contractor is not entitled to fees, for himself or his counsel out of this fund, for finishing the contract. The assignee's services were not a continuation of the assignor's business, petitioned for and ordered by the court, pursuant to General Code, 11125; and no special allowance therefor in prejudice of the valid claim of the other parties to this action, can be made, under General Code, 11144, out of the avails of said contracts.

A decree may be taken as in the court below.

### **PROCEDURE FOR BREACH OF CONTRACT.**

Circuit Court of Summit County.

**THE MAGADORE STONEWARE CO. v. THOMAS HIERS.**

Decided, April 12, 1911.

*Action on Contract or for Breach of it—What Must be Alleged—Measure of Damages.*

In an action growing out of a contract for work and labor, where the plaintiff relies upon repudiation of the contract before its completion by him, he should sue for its breach; if he alleges full performance, he must prove it, and in such case the measure of his recovery is the reasonable value of the work and not the sums expended to accomplish it.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The parties to this proceeding in error stand here in the relation opposite to that in which they stood below. The action

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was appealed to the court of common pleas from that of a justice of the peace. Hiers recovered a judgment on the following cause of action set forth in his second amended petition, which alleges "that the defendant, the Mogadore Stoneware Company, is indebted to him in the sum of \$285.95 for work done, labor performed and money paid out by him for said company, at its special instance and request under a contract entered into by and between this plaintiff and said defendant company, whereby and by the terms of which contract the plaintiff was to open for the defendant company a clay mine on what is known as the Webb farm in Springfield township, Summit county, Ohio. He further says that said contract was entered into verbally on or about the 10th day of May, 1908, by and between plaintiff and the said Mogadore Stoneware Company, and through Charles F. Sheeby, its general manager and agent, said Sheeby then and thereby, in the making of said contract with this plaintiff, acting as such general manager and agent of the defendant company on its behalf. Plaintiff further says that, acting under and in performance of said contract so entered into as aforesaid, he proceeded to and did open a clay mine for the defendant company; that in performing said work under aforesaid contract he paid to the several persons named below, for work and labor done and performed by them in the opening of the said mine by this plaintiff for the defendant company, the sums of money hereinafter immediately following set forth."

After itemizing at length his accounts and outlays for labor, the second amended petition continues: "Plaintiff further says that, acting under and in performance of said agreement, he also made the following expenditure of money for material used in doing the work of opening said clay mine." The items are then set forth.

The petition concludes with averments concerning Sheeby's authority to make said contract, the company's receipt and retention of the benefits of the labor performed and expenditures made thereunder, and the fact that the said sum of \$285.95 for which judgment is prayed, is due and wholly unpaid.

The facts, as testified to by Hiers, are that on April 11, 1908, he agreed verbally with the stoneware company to open the lat-

ter's clay mine to the clay for the sum of \$50, and that within the month he completed this contract and received his pay. On April 27, they entered into a further contract in writing, "to continue as long as the parties thereto mutually agree," for the mining of clay by Hiers for the company at fifty-five cents a ton. Hiers worked one day under this contract and then threw it up, because the clay wall proved to be but a shell, behind which was an old abandoned working. Hiers called Sheeby's attention to this and asked what he should do. Sheeby said, "Go ahead, we've got to have the clay." Hiers thereupon continued the work through the old working. He had four or five men in his employ for about two months and furnished slabs and plank for timbering the mine. Upon applying to Sheeby for an advance of money upon his contract in order to meet his disbursements, he discovered that the company claimed that he was still working under his first contract to open the mine to the clay. Meanwhile pockets or pillars of clay were found from time to time, but no large deposit was reached.

Hiers quit his work, and the company continued it till clay in larger quantity was found; but the company's business languished, and was soon abandoned. Hiers sued to recover what he had expended under his alleged third contract, and the company counter-claimed for the cost of completing his first contract.

The theory of Hiers' second amended petition is that he fully performed his third contract, and that the measure of his recovery is the amount expended by him. His evidence shows that the company repudiated the contract before it was completed. He should, therefore, have alleged the fact of breach by the company instead of alleging his own full performance of the contract. But if he stands upon his claim of performance, he must, of course, prove it, and in that case, the measure of recovery is the reasonable value of the work, and not the sums expended to accomplish it. The second amended petition does not state a cause of action; nor is the evidence or the charge such as to cure the petition's defects after verdict. By amending his petition once more, the plaintiff may be able to recover. But for three reasons, viz: first, that the petition does not state a cause of action; secondly, that the evidence fails to support the aver-

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ment of the petition that the alleged contract was fully performed; and thirdly, that the charge on the measure of recovery is erroneous, in view of Hiers' claim of full performance on his part, the judgment is reversed and the cause remanded.

### TITLE CLOUDED BY CONDITION IN WILL.

Circuit Court of Wood County.

CHARLES BARR AND ALBERT O'MERCER V. FRANK E. SWARTZ.

Decided, October 28, 1912.

*Specific Performance—Action to Enforce—Defense of Imperfect Title—Uncertainty as to Devolution of Title Under Condition of Devise.*

The defense of imperfect title is good against an action to enforce specific performance of a contract to purchase land, where it appears that the plaintiffs derived their title from one who took by way of devise from his father, on condition that should he die without issue living, "the lands shall descend to my other children mentioned in this will share and share alike," and where it appears from the testimony that the devisee is still living and has children living.

*Edward Beverstock and E. G. McClelland, for plaintiffs.*

*Eugene Rheinfrank, N. R. Harrington and G. C. Nearing,*

*contra.*

WILDMAN, J.; KINKADE, J., and RICHARDS, J., concur.

This is an action brought to this court by appeal to enforce the specific performance of a land contract, executed June 7th, 1910, and partly performed by payment of an installment of the purchase price. The contract contemplated complete execution by March 1st, 1911, on or about which date a deed was tendered by the plaintiffs to the defendant and refused. The claim of the defendant is that by the terms of the contract, he was to have a good and perfect title to the land contracted for; that subsequent to the execution of the contract he discovered that such title could not be obtained and granted to him and for that

reason he demanded a rescission of the contract. Notice of his wish for such rescission had been given prior to the time fixed for the complete payment and transfer of title, and promptly upon his discovery of the claimed defect.

The claimed title of the plaintiffs is based upon the conveyance of one James Porter, together with quit-claim deeds from Porter's brothers and sisters. James Porter and his brothers and sisters so quit-claiming, reasserted by the plaintiffs to have derived their title to the land in question by virtue of the will of Christopher Porter, their father, who died intestate some years before the execution of this contract. The provision of said will relating to the present controversy devises to James Porter the said land, charged with certain payments to a daughter and the widow of Christopher, and then qualifies the devise in the following words:

"The devise in this item to my son James is on this condition that, should he die without issue living, the said lands shall descend to my other children mentioned in this will share and share alike."

The charge upon the land in favor of the daughter and widow has been extinguished by performance subsequent to the death of Christopher, leaving the question only as to the character and extent of the title devised to James, freed from the charge which I have mentioned.

It is the contention of the defendant that the title of James and the interest of his brothers and sisters joining in the quit-claim deed is of such doubtful character as to justify a court of equity in refusing a decree for specific performance. This contention is based upon numerous authorities. But they need not be reviewed by us in view of the emphatic holding of the Supreme Court of our own state in the case of *City of Tiffin v. Shawhan*, 43 O. S., 178. I quote the third paragraph of the syllabus:

"If the specific performance of such a contract would be harsh, oppressive, or inequitable in its consequences, or would leave the purchaser with a doubtful and unmarketable title, the court, in the exercise of its discretion, will refuse to decree its

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performance as no man will be compelled to accept a doubtful title."

We might cite, as counsel have done, numerous adjudications expressing the view that a purchaser under land contract is not compelled to accept a clouded title, one unmerchantable, or which is likely to involve him in litigation to defend it. The equity of this rule is manifest, and we have no hesitancy in assenting to it or in applying it to the conditions presented by the evidence in the case at bar. In saying this we wish not to be understood as departing in any respect from the construction heretofore placed by this court upon the will involved in the title to land litigated in the Anderson-Messenger cases, and as affirmed by the Supreme Court in *Anderson v. Realty*, 79 O. S., 23.

The United States Circuit Court of Appeals has adopted a construction in conflict with the one obtaining in the state court, basing its decision upon the case of *Shaw v. Hoard*, 18 O. S., 227.

If the view of this federal court were to be adopted, it would place the title to the real estate devised in the issue of James Porter, if any there shall be living at the time of his death. It is disclosed to us in evidence that, although he was unmarried at the date of his father's will, he is now the father of four minor children, not parties to the litigation before us. We can not say that there is no possibility of their surviving their father, James Porter, and at some time in the future asserting title to this land. If they, or either of them should be non-residents of this state, the result might be litigation in the Federal court, which, if the last adjudications in that court on this subject should remain unreversed by the Supreme Court of the United States (in which we understand the question is now pending), the result would be disastrous to the claimed title of the plaintiffs in this action or of the defendant if ordered to fulfill the contract of purchase.

For reasons stated, decree for specific performance will be refused. The defendant has made payment of the sum of \$500 as a first installment of the purchase price and one negotiable note for a like sum given by the defendant to plaintiffs to apply also upon the purchase price of the land, has been sold to some other party or parties.

It is conceded by counsel that if the plaintiff is not entitled to specific performance, the claim of the defendant for reimbursement to the amount of \$1,000 and interest thereon, is just and should prevail. Judgment may be taken accordingly.

**PROSECUTION FOR EMBEZZLEMENT OF ONE ACTING AS  
AGENT AND ATTORNEY.**

Circuit Court of Medina County.

**EMANUEL F. SHELLEY V. STATE OF OHIO. \***

Decided, May 23, 1911.

*Embezzlement—No Limitations—Construction of Statutes—Punctuation  
—Evidence in Criminal Case—Definition of Embezzlement.*

1. There is abundant authority in this state for disregarding or re-arranging punctuation of statutes in order to effectuate the evident meaning of the Legislature.
2. The three year limitation in Section 6842, Revised Statutes, applies only to the period within which different conversions may be aggregated so as to constitute one embezzlement, and does not interpose any bar to the prosecution of the crime of embezzlement.
3. At the trial of one indicted, for embezzlement of funds of one for whom he had been appointed guardian, the judgment and orders of a court upon exceptions filed to the accused's inventory and accounts as guardian, are not admissible in evidence.
4. The nature of the crime of embezzlement is such that although money may be received by an agent or servant from time to time as it comes into his hands lawfully, there may be no completed crime of embezzlement until, having thus received several sums at different times he finally refuses or is unable to account for the aggregate amount.
5. One is not guilty of embezzlement who has not concealed the receipt of money alleged to have been embezzled, but, on the contrary, has claimed in good faith to keep it under some right as against the owner.

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\*Affirmed by the Supreme Court on grounds stated in this opinion, *State v. Shelley*, 85 Ohio State, 481.

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*F. V. Owen, F. N. Patterson and Frank Heath*, for plaintiff in error.

*George Frey, N. M. Wolf, C. M. Workman, W. J. Weirick and N. H. McClure*, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Plaintiff in error was convicted of embezzling \$15,000 September 28th, 1904, while agent and attorney-in-fact for one Paul Oliver, the trial occurring in October, 1910, upon a change of venue from Ashland to Medina county.

The first error assigned involves the construction of Section 6842, Revised Statutes of Ohio, upon the question of the three years limitation therein prescribed for the prosecution of embezzlers, the indictment in this case having been returned more than three years after the date of the offense therein charged.

We hold, however, that the concluding clause of said section should be read as if there were commas after the word "time" and "prosecution," and none after the word "times."

The clause as thus punctuated will then read: .

"If the total value of the property embezzled in the same continuous employment of term of office, whether embezzled at one time, or at different times if within three years prior to the inception of the prosecution, amounts to or exceeds thirty-five dollars, shall be imprisoned in the penitentiary not more than ten years, nor less than one year, or, if such total value is less than thirty-five dollars, be fined not more than two hundred dollars, or imprisoned not more than thirty days, or both."

The three years limitation applies only to the period within which different conversions may be aggregated so as to constitute one embezzlement, and does not interpose any bar to the prosecution of the crime of embezzlement generally.

The reasons for this conclusion are well pointed out in *State v. Bailey*, 19 O. D., 442; see also *State v. Gibbs*, 9 N.P.(N.S), 129. There is abundant authority in this state for disregarding or rearranging punctuation of statutes in order to effectuate the evident meaning of the Legislature. *Albright v. Payne*, 43 O. S., 15; *Skriedley v. State*, 23 O. S., 140; *Slingluff v. Weaver*, 66 O. S., 629; *Allen v. Russell*, 39 O. S., 337; *Hamilton v. Steamboat*

*Hamilton*, 16 O. S., 429; *Burgess v. Everett*, 9 O. S., 428; *Pan-coast v. Ruffen*, 1 Ohio, 385, 386.

We hold therefore, that this prosecution is not barred by any statute of limitation.

A further assignment of error is that the court erred in charging the jury as follows:

"Gentlemen of the jury, the other day there was certain evidence offered in this case, in the nature of records of the pages of the journal of the court of common pleas and the circuit court of Ashland, as to the two items of accounts in the account of E. F. Shelley, as guardian of Paul Oliver, being one item for \$10,000 and another item for \$5,000; there were other items, but I simply call your attention to these two, which it is claimed by the state were items embezzled and with which the defendant is charged for one crime of embezzlement. Now, so far as those two items are concerned, they were adjudicated in the court of common pleas, which case was affirmed by the circuit court, and the court admits the records of those two courts upon the question as to whether or not those two items were legal items of charge for which Shelley should have been credited as to whether the charges simply were legal, and they are admitted for no other purpose." (Bill of exceptions, pages 89 and 90.)

The adjudication referred to is the judgment and orders of the court upon the exceptions filed to Shelley's inventory and accounts as guardian of said Oliver's estate, to which office he was appointed October 4, 1904, after having had virtually sole charge of his ward's property for some five months previous to that date, by virtue of a general power of attorney appointing him the attorney-in-fact of said Oliver.

For some years prior to 1904, the accused claims to have done much business for Oliver. In his accounts as guardian, he charges himself with assets received both before and after the date when said guardianship commenced, and seeks to credit himself with \$15,000 compensation for his services in all said capacities, including \$10,000 for services before, and \$5,000 for services during the guardianship. These credits were both disallowed in the adjudication referred to, and the record of that proceeding constitutes the backbone of the proof of guilt in this prosecution.

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In *Gee v. State*, 60 O. S., 485, it was held that:

"On the trial of the issues joined by a plea of not guilty to an information or an indictment charging the defendant with willfully and negligently failing to support his illegitimate child, the record of a bastardy proceeding instituted by the mother of the child in which the defendant was adjudged to be its reputed father is not admissible evidence."

The *per curiam* opinion, 60 O. S., 486, is as follows:

"The record offered is not competent under the general rule that in a criminal proceeding the record of a civil action can not be introduced to establish the facts on which it was rendered. The judgments offered followed verdicts which might have been lawfully returned upon a mere preponderance of evidence. A higher degree of evidence was required to convict under the indictment and the information. *Greenleaf on Evidence*, Section 437; *Britton v. State*, 77 Ala., 302; *Riker v. Hopper*, 35 Vt. 457."

In view of the foregoing authority, we hold that the judgments disallowing Shelley's claims for compensation ought not to have been received in evidence. They were not admissible for any purpose, although it was discretionary with the court to allow or disallow the claim of \$5,000 for compensation to the guardian. This could have nothing whatever to do with Shelley's embezzlement of said amount before the guardianship began.

As to the \$10,000 the adjudication, founded not upon the exercise of judicial discretion, but strictly upon proof, was nevertheless predicable upon a rule of evidence requiring only a preponderance instead of proof beyond a reasonable doubt. In other words, it required no production of the record of another case to show that Shelley was not (since he could not be) entitled to guardian's fees September 28, 1904, not only before their allowance by the court, but before the guardianship began; neither does the fact that he was adjudged in a civil proceeding not to have earned \$10,000 prior to the guardianship tend to prove in this proceeding that his claim to compensation in that amount on said date was unwarranted.

We hold, therefore, that the court erred in admitting said evidence, and in charging thereon as above indicated.

Third, we see no reason why the court should have refused the first and fifth special request to charge (bill of exceptions, 92 and 93) as follows:

"1st. The nature of the crime of embezzlement is such that although money may be received by an agent or servant from time to time as it comes into his hands lawfully, there may be no completed crime of embezzlement until, having thus received several sums at different times, he finally refuses or is unable to account for the aggregate amount.

"5th. The court instructs you that if the defendant has not concealed the receipt of the money alleged to have been embezzled, but has claimed in good faith to keep it under some right as against the owner, then he is not guilty of embezzlement, and your verdict should not be guilty." *Young v. State*, 26 C. C., 747; 1 *McClain's Criminal Law*, 641.

We do not understand that a demand for the property alleged to have been embezzled must in all cases have been made by the owner upon the accused, in order to lay a foundation for a prosecution. Refusal of such a demand, when properly made, would of course be evidence of conversion and embezzlement, except as circumstances might exist excusing such non-compliance. In this case, however, we fail to discover any evidences, except that which, as above indicated, is clearly incompetent, to show that Shelley had converted any part of the estate to his own use, or that he has failed to account for and pay over the same to those properly entitled thereto. With the incompetent eliminated, there is not enough left whereon to found a verdict of conviction. The several motions, including the motion for new trial by which this point was raised and saved, were erroneously overruled.

We have examined all the numerous rulings on evidence not already disposed of without finding any such prejudicial error therein as to warrant reversal upon that ground; but for errors above indicated, to-wit, the admission in evidence of the record of the civil case or cases, the court's charge with respect thereto, the refusal of the court to grant the first and fifth special requests to charge presented by the defendant below, and for overruling the motion for new trial upon the ground that the competent evidence was not sufficient to warrant conviction, the judgment is reversed and the cause remanded.

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**LIABILITY OF ENDORSER OF THE LAST OF A SERIES OF  
NOTES SECURED BY MORTGAGE.**

Circuit Court of Medina County.

**THOMAS FERRIMAN V. THE SAVINGS DEPOSIT BANK.**

Decided, May 23, 1911.

*Endorser of Last of Series of Notes Secured by Mortgage—Agreement to Release Endorser—Stipulation in Mortgage as to All Notes Becoming Due, Not Binding on Endorser—Effect of Judgment in Foreclosure Case.*

1. One who has endorsed the last of a series of notes secured by mortgage upon an agreement that he is to be released from his endorsement upon the payment of the first note of the series by the maker, his heirs or assigns, is not entitled to such relief upon payment of the first note out of the proceeds of sale of the mortgaged land upon foreclosure.
2. To charge an endorser of the last of a series of notes secured by mortgage, it is to be deemed due according to its terms, irrespective of an agreement in the mortgage that all should become due upon failure to pay one; hence an adjudication in a foreclosure of said mortgage, brought against the maker and endorser of the notes before the endorsed note is due is not a bar to another action against the endorser after said note becomes due.

*Lee Elliott and J. W. Seymour, for plaintiff in error.*

*Frank Spellman, contra.*

**HENRY, J.; WINCH, J., and MARVIN, J., concur.**

The parties to this proceeding in error stand in the relation opposite to that in which they stood below. The action then was one brought by the bank against Ferriman on his guaranty and endorsement of two notes.

In the common pleas court, a jury was waived and this cause submitted to the court (Hon. George Hayden, Judge) upon the petition, answer, reply and an agreed statement of facts, as appears by the bill of exceptions.

The court (sitting as a jury) found for the plaintiff, the Savings Deposit Bank Company, and rendered judgment against the defendant, Thomas Ferriman.

**VALUATION OF REAL ESTATE FOR TAXATION.**

Circuit Court of Summit County.

**ELIAS S. DAY ET AL V. ARTHUR J. WEEK ET AL.**

Decided, June 2, 1911.

*City Board of Review—Powers of.*

A city board of review, under Section 5624, General Code, has power to make wholesale increases in the valuation of real estate in the city as fixed by the quadrennial appraisers, without making corresponding decreases.

*Geo. M. Anderson and Charles Howland, for plaintiff in error.*  
*F. J. Rockwell, C. T. Grant, N. M. Greenberger and J. Taylor,*  
contra.

**MARVIN, J.; WINCH, J., and HENRY, J., concur.**

The petition in this appeal challenges the power of the Akron city board of review, under General Code, 5624, to make wholesale increases in the valuations of real estate in said city, as fixed by the quadrennial appraisers, without making corresponding decreases. We understand that the question of the constitutionality of the statutes involved is no longer pressed. If, however, it be relied on, it is sufficient now to say that no such clear case of conflict with any constitutional provisions is here presented as to warrant our so holding. On the question of notice, too, the opportunity afforded by law for a hearing, after the increases were resolved upon and made public, satisfies the constitutional guaranty of due process of law. The power of the board is then the sole question before us.

The present policy of the law is more clearly defined by the act approved March 2, 1911, Section 5624-1 whereof provides that:

“Boards of review for municipal corporations sitting as boards of equalization and revision, shall have and exercise, in so far as the same may be applicable, all the powers and perform all the duties, and be governed by the same rule and limitations, conferred or imposed by the law upon the annual county boards of

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equalization of real and personal property, moneys and credits, and quadrennial county boards of equalization of real property outside of cities, and such boards sitting as boards of revision," etc.

This act was not, however, in force when the increases complained of were made: but it may aid in the construction of the pre-existing law (General Code, Section 5624), though phrased more concisely than Revised Statutes, Sections 2819-1, must, unless the contrary is plainly intended, be deemed to be identical with it in meaning (*State, ex rel, v. Commissioners*, 36 O. S., 326). It now defines the powers and duties of municipal boards of review as the same as those "provided by law for all other municipal boards of equalization and revision." It formerly defined them as the same as those "conferred upon or required of the annual city board for the equalization of the value of real and personal property, moneys and credits; the decennial city board, for the equalization of the value of real property; and the annual city board of revision; and the decennial city board of revision, under any and all laws now in force, pertaining to such municipalities."

Sections 2815 and 2816, Revised Statutes, were, it is significant, left unrepealed by the General Code. They provide for decennial city boards of equalization with the same powers and duties as those of the decennial county board of equalization (Revised Statutes, 2814, General Code 5598). The county auditor was, by Section 2813, Revised Statutes (5594, General Code), made a member of such board; and upon complaints filed with or preferred by him, or filed with the board as such, it was empowered, by Section 2814a, Revised Statutes (5599-5601, General Code), while sitting as a board of revision, to "increase or decrease any valuation complained of, and no others," in accordance with the "laws in force governing the valuing of real property."

This limitation, as to acting only upon complaints filed, does not, however, apply to the decennial county board of equalization sitting as such; the only express limitation upon them in that capacity being that "they shall not reduce the aggregate

value thereof, as returned by the assessors, with the addition made thereto by the auditor, as hereinafter required." The municipal board of review is invested with all the powers of said county board in each of these capacities and it is clear, from General Code, Section 5598 (Section 2814, Revised Statutes), that in their preliminary work, they may of their own motion raise values to conform with the standard required "by the laws in force governing the valuing of real property." Such is also the present provision of law as contained in, or contemplated by, the act of March 2, 1911, Section 5624-1. The increases here complained of were made in the primary work of equalization of the values tentatively fixed by the quadrennial appraisers, in order that, as finally determined, they should agree with the standard aforesaid.

We hold, therefore, that the petition makes no case for enjoining the defendants from making the increases complained of. The demurrer to the petition was properly sustained upon the fifth ground. The third ground of demurrer was, also, we think well taken.

Judgment affirmed.

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**LOSS FROM CLOGGING UP OF A SEWER.**

Court of Appeals for Hamilton County.

**CITY OF NORWOOD V. THE GOBRECHT-GEYER COMPANY.**

Decided, March 15, 1913.

*Municipal Corporations—Not Liable for Damage from Water Backing Up Through Sewer, When.*

There can be no recovery from a municipality on account of the flooding of a basement or cellar by reason of the obstruction of a sewer, where notice of the obstruction is not shown and no negligence appears in the construction, maintenance or care of the sewer.

*H. E. Engelhardt*, City Solicitor of Norwood, for plaintiff in error.

*Albert H. Morrill* and *H. C. Bolsinger*, contra.

**JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.**

This action was for the recovery of damages to goods and furniture of plaintiff stored in its basement caused by the backing up of water from the city sewer, brought about by the stopping up or obstruction of the sewer on two separate occasions.

The amended petition sets out a charge of negligence in the following language:

"This defendant carelessly and negligently allowed said sewer to become clogged and stopped up and failed to properly inspect said sewer and keep the same in repair, open and in working order."

There is no allegation of defective or improper construction, or of failure on the part of the city to remove the obstructions when brought to its notice.

Counsel for defendant in error however claim that by virtue of Section 11363, General Code, under the evidence produced at the trial plaintiff below might even now have its amended petition amended to conform to the evidence and that the evidence shows such faulty construction and failure to properly maintain and inspect this sewer on the part of the city as to entitle it to recover.

It may well be doubted whether the statute referred to would now permit the amendment of the petition after defendant's motion for an instructed verdict and the overruling of its motion for a new trial and the judgment below, even if the evidence would make out plaintiff's claim. But we do not find that the evidence sustains the contention of defendant in error.

On the contrary the only claim of anything faulty or improper in the construction of this sewer is the fact that a ten-inch pipe enters a manhole from which the outflow is an eight-inch pipe, but the uncontradicted testimony of the city engineer who planned the sewer shows that, because of the difference in the grades at which the two pipes are laid, the one carries off the sewage as fast as the other delivers it and that the construction of the sewer was in all respects a proper one. The evidence also shows that this sewer had the usual inspection, and that the flooding was on both occasions caused by such an obstruction of sticks, leaves, etc., as might occur in any sewer no matter what its construction; that the city had no notice actual or constructive of the obstructions until the damage had occurred, and immediately upon receiving such notice it proceeded promptly to remove them, and as to the second flooding the evidence from the government records shows a very unusual rainfall.

We therefore find no evidence of negligence on the part of the city, either in construction, maintenance or care of this sewer, and the court below erred in not instructing a verdict for defendant. The judgment below will be reversed and judgment entered here for plaintiff in error.

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Cuyahoga County.

**TESTAMENTARY CAPACITY AS AFFECTED BY  
INTEMPERANCE**

Circuit Court of Cuyahoga County.

**KATE FAGAN ET AL. V. BRIDGET WELSH ET AL.**

Decided, January 26, 1909.

*Will Contest—Presumption from Guardianship for Intemperance—  
Relation of Ward to Person with Whom She Boards.*

1. Guardianship on the ground of intemperance does not raise the same presumption of testamentary incapacity as would be the case if the guardianship rested upon the ground of insanity or imbecility.
2. The relation of a ward under guardianship for intemperance, to a person with whom she boards under an arrangement made by the guardian for her, though such person has received certain instructions from the guardian as to the care of the ward, is not the same as the relation of the ward to the guardian, and does not, of itself, raise a presumption of undue influence in an action to set aside a will under which such person is a beneficiary.

*A. A. & A. H. Bemis, for plaintiff in error.**P. H. Kaiser and Foran, Pearson & Powell, contra.***METCALFE, J.** (of the Seventh Circuit, sitting in place of **MARVIN, J.**); **WINCH, J.**, and **HENRY, J.**, concur.

This action was brought by Kate Fagan, plaintiff herein, in the court below, to contest the will of Coena Murphy.

The errors complained of all relate to requests for instructions to the jury, and the general charge of the court. The question of the weight of the evidence is not raised, and the whole evidence does not appear in the record. There was a verdict and judgment in the lower court sustaining the will and this action is to reverse that judgment.

The facts, so far as they are necessary to an understanding of the questions raised, are as follows:

Coena Murphy was an orphan girl of about the age of 20 years at the time of the execution of this will. She was possessed of some property, consisting mostly of real estate in the city of

Cleveland. Some time in 1905, Mr. Wm. T. Clark was by the probate court of this county appointed guardian of her person and property, under favor of Section 6317, on the ground that she was incapable of taking proper care of herself or her property by reason of intemperance. It appears also that before this appointment an application was made for the appointment of a guardian on the ground of mental incapacity, which failed or was withdrawn, as appears. In accordance with some understanding between the parties, Mr. Clark, upon his appointment as guardian, made an arrangement with the defendant, Bridget Welsh, to board and care for his ward, and from that time until her death, which occurred in June, 1905, Coena Murphy continued to reside with Mrs. Welsh. The will in question was made by someone in Mr. Clark's office, a few weeks before Coena's death, and gave all her property to Mrs. Welsh. At the time Mr. Clark made his arrangements with Mrs. Welsh to take care of Coena, he gave her some general directions about the way she was to be taken care of.

There is no evidence in the record tending to show undue influence or mental incapacity, and the only questions raised in the case come from the refusal of the court to give certain requests to charge, made by plaintiff in error; the giving of certain requests made by the defendants, and alleged error in the general charge.

The fifth and sixth requests to charge before argument, raise this question: Did Mrs. Welsh stand in the same relation to Coena Murphy as her guardian to such an extent that the mere fact that Coena made her will in Mrs. Welsh's favor raised a presumption that the will was procured by undue influence. And, if so, was the burden of the proof thereby thrown upon the proponents of the will to disprove undue influence on the part of Mrs. Welsh?

We are unable to see how the mere fact that Mrs. Welsh was employed and paid by Coena's guardian to board and care for her could place her in the same fiduciary capacity as the guardian himself. It is true that Mrs. Welsh took Coena into her house, probably treated her as a member of her family; per-

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haps was a mother to her. This family relation would undoubtedly be one of trust and confidence between Mrs. Welsh and Coena, which if there were any evidence tending in any way to show had been used by Mrs. Welsh to induce the making of the will, would undoubtedly raise a suspicion of unfairness and perhaps a presumption which it would be necessary to rebut.

This would be more particularly so if there were evidence tending to show mental weakness on the part of Coena. We do not think, however, that we are required to entertain a presumption of mental weakness on account of the guardianship alone. The guardian was appointed solely on the ground of Coena's habits of intoxication and might be entirely consistent with the possession of testamentary capacity or even of extraordinary mental endowments. While the fact of the guardianship on the ground of intemperate habits would be evidence for the jury to consider as bearing on her mental condition, yet we do not think that the fact of the guardianship on this ground would raise the same presumption of testamentary incapacity as would have been the case had the guardianship rested upon the ground of insanity or imbecility, or any other form of mental weakness or disease.

There may have been evidence of mental weakness given at the trial, but that we know nothing about. We are deciding the question before us purely on the presumptions sought to be raised by the appointment of the guardian and the employment by him of Mrs. Welsh to take care of his ward and the relations of friendship and intimacy thus established. We do not think that the mere fact of employment of Mrs. Welsh and the friendly relations thus established, is sufficient of itself to raise a presumption of undue influence on the part of Mrs. Welsh, at least not without some evidence tending to show that such friendly relations were abused, or exerted in some way to influence the making of the will. We do not think that Mrs. Welsh stood in the shoes of the guardian in this respect.

Supposing, however, that we are wrong in this conclusion, and that a presumption of undue influence is raised against Mrs. Welsh by the fact of her relationship to Coena Murphy. What

is the degree of proof required to rebut the presumption? The issue in a will contest is simplified by statute to the single question: Is the paper in question the last will and testament of the testator? The party sustaining the will has the right to open and close the evidence and the argument. He must offer the will and order of probate thereof and rest his case. The order of probate is *prima facie* evidence of the due attestation, execution and validity of the will. By these provisions of the statutes, which I have thus summarized, it is sure that the only burden resting on the party sustaining the will is to offer certain evidence which the law requires to make a *prima facie* case sustaining the will. The burden then rests on the contestants to prove something necessary to render the will invalid. Are the contestants relieved of this burden at any stage of the trial?

We think not. While it may happen that in the course of the trial some issue may arise, the burden of which would rest upon the party sustaining the will, the general burden of proof, as to those things which render the will invalid, does not change. The degree of proof required to rebut a presumption is not a preponderance of the evidence, but evidence equal in counter-vailing weight to the effect of the presumption. In *Klunk v. Railway*, 74 O. S., 125, the action was by a locomotive engineer to recover for injuries sustained by the breaking of a water guage, the breaking of which raised a *prima facie* presumption of negligence. In the second proposition of the syllabus it is said:

“Proof of facts sufficient under the statute to create a *prima facie* presumption of negligence against the defendant cast upon it the burden of producing evidence of equal weight or counter-vailing force, in order to control or destroy the presumption, yet proof of such facts does not impose upon the defendant the burden of establishing affirmatively by a preponderance of the evidence, that it was not negligent.” *Hutson v. Hartley*, 72 O. S., 262.

We think these cases settle the question that the burden of proof in a will contest does not shift as to any question at issue necessary to establish the invalidity of the will. The contestants in the fifth proposition to charge before argument, asked

the court to say that the same fiduciary relation existed between the girl and Mrs. Welch as existed between her and her principal guardian, and this relation raises a presumption of undue influence and casts upon the proponents of the will the duty of showing by a clear preponderance of the evidence that there was not such undue influence, but that everything connected with the making and execution of the instrument was free from impropriety and unfairness.

We think the court was right in refusing to so charge. And proposition six was equally vicious.

Proposition four might possibly have been given to the jury without prejudice. It is, however objectionable in that it assumes the existence of other evidence of mental incapacity and the probable existence of undue influence, and gives undue prominence to both these questions. Hence, there was no error in refusing to give it.

We think that the proposition submitted by the defendant were all applicable to the issues in the case, and were properly given.

Proposition one, made after argument, relates to the effect of the order of probate appointing a guardian for Coena Murphy, and the *prima facie* presumption of testamentary incapacity thereby raised. Conceding that the appointment of the guardian did raise this *prima facie* presumption, we think the request was faulty in confining the evidence to rebut the presumption too exclusively to the 2d day of June, the date of the execution of the will. In this it might have been misleading. It was the duty of the jury to look to all the evidence on the question of mental capacity, and then say whether or not at the time the will was made, she was of sound mind, etc. The jury might have understood from his request that they were confined to evidence relating only to the 2d day of June. So we think there was no error in refusing the request.

Request No. 2, after argument, is disposed of by our holding as to the numbers five and six. before argument.

In regard to the general charge; the court, after properly defining the amount of capacity and the understanding which

he must have of the extent of his property, his relation to the objects of his bounty, the effect of his will and the strength of mind necessary to perceive their obvious relations to each other, etc., used this language:

“Though he may not be able to understand and appreciate these matters in all their bearing as a person in sound and vigorous health of mind and body would do.”

This language is excepted to. The qualifying words “sound and vigorous” relate to the health of the mind. The mind may be enfeebled by age or sickness, indeed, if our learned physiologists are right, very few do possess perfectly sound and vigorous health of mind and body. And yet there may be testamentary capacity, and we think that the use of the phrase in question is entirely consistent with the rest of the charge on that question, and there was no error in its use.

The following language also is excepted to: “The law gave to Coena Murphy the right to dispose of her property by last will and testament, lawfully executed, in any way she saw fit.” And in this connection also the court said: “You are not at liberty to make a will for her. That was her right. You are simply to decide whether the one she has made was sanctioned by and fulfilled the requirements of the law.” Perhaps this language might be criticised in the way it is expressed, but it states the law correctly. Coena Murphy, if of sound mind, had a right to make a will. The question of soundness of mind was for the jury, and in view of the instructions on that point, we do not see how they could have been misled by the language used. It was perfectly proper for the court to impress upon the jury that they were not to be governed by their own ideas of what Coena ought to have done, but decide whether the requirements of the law had been fulfilled.

Referring to the paper in controversy as “the will” or “the will she has made” in that connection would not be calculated to mislead.

The part of the charge excepted to, relating to influence obtained over a testator by kindness, affection, friendly attention, etc., is conceded to be a perfectly correct statement of the law,

and we see no reason why it should not have been given in this charge. The charge also is correct on the burden of proof. In summing up the court said:

"If the contestants have proved by a preponderance of the evidence any one of these things as to which the burden of proof was on them, then you should return a verdict finding the paper produced not to be the last will and testament of the deceased, but if they have failed to prove any one of them to your satisfaction, by a preponderance of the evidence, you should in that case return a verdict sustaining the will."

The expression "failed to prove any of them" would seem at first blush to have required the contestants to prove all of the claims made to invalidate the will. It is evident, however, that this is not what the court meant. The jury are told that if the contestants have proved any one of the things, the burden of which rested on them, they were entitled to a verdict setting the will aside, so that they could not without superhuman dullness have understood the subsequent expression used in that very connection, "failed to prove any one of them" to have meant that the contestants must prove all the claims.

The judgment of the court of common pleas is affirmed.

**PAYMENT ORDERED TO BENEFICIARY INTENDED BY THE  
DECEASED.**

Circuit Court of Cuyahoga County.

**JANE ABERNETHY v. SUPREME COUNCIL OF THE ASSOCIATION OF  
CATHOLIC MUTUAL BENEFIT ET AL.**

Decided, January 25, 1909.

*Mutual Benefit Association—Change in Beneficiary—Inability to Com-  
ply with Rules—Intention of Member.*

Where a mutual benefit association pays into court the fund due the beneficiary of one of its deceased members with the statement that there are rival claimants to the fund and asks the court to determine to which claimant it shall be paid, the fund will be ordered paid to the beneficiary clearly intended by the deceased member, though by irregular designation, circumstances over which he had no control and his death preventing a change in beneficiaries strictly in accord with the rules of the association.

*Kerruish & Kerruish*, for plaintiff in error.

*Herman Preusser and Walter D. Meals*, contra.

METCALFE, J. (of the Seventh Circuit, sitting in place of Henry J.) ; WINCH, J., and MARVIN, J., concur.

Defendant in error, plaintiff below, began this action by filing in the common pleas court a paper called a petition for an interpleader, to which Jane Abernethy, Jennie McCormick and Edna McCormick were made parties defendant.

The facts in this case, as far as it is necessary to state them in order to understand the issues, are, in brief, about as follows:

The defendant in error, as its name indicates, is a mutual insurance association. Charles E. Abernethy was a member in good standing of said association, holding a benefit certificate therein for one thousand dollars, which became due and payable in sixty days after his death, on proper proofs and notice of death. Charles Abernethy died June 3, 1905. Jane A. Abernethy was his wife, and was named as beneficiary in the certificate. Jennie McCormick was a sister of Charles, and Edna

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McCormick was his niece. Shortly before his death Charles E. Abernethy attempted to revoke the direction in the benefit certificate, as to whom payment should be made at his death, by the execution of the following instrument:

“CLEVELAND, O., June 1, 1905.

“To the Catholic Mutual Benefit Association, Cathedral Branch, No. 33, Roll 148.

“I, Charles E. Abernethy, to whom a certificate was issued in said beneficial order, hereby revoke my former direction as to the payment of the beneficiary fund at my death, and now authorize and direct such payment to be made to my sister, Mrs. Jennie McCormick, residing at 59 Delaware street in the city of Cleveland, Ohio, and to Miss Edna McCormick, my niece, daughter of Mrs. Jennie McCormick, above referred to.

“Witness my hand the 1st day of June, 1905.

“CHARLES A. ABERNETHY.

“Witness:

“J. J. Wagner, 647 St. Clair St.

“Jane A. Abernethy, 59 Delaware street.”

The association claimed that it was unable to decide to whom the mortuary benefit belonged, by reason of the conflicting claims of Jane Abernethy and the McCormicks, so paid the money into court and asked that the defendants be required to set forth their respective claims to the money, which they did by way of cross-petition, and the only issues to be determined arise under the allegations of their several cross-petitions and the answers and replies thereto.

Jane Abernethy claimed the money by virtue of her designation as beneficiary in the original certificate. Jennie McCormick and Edna McCormick claimed it by virtue of the instrument executed by Charles Abernethy June 1, 1905. So that the only question for this court to determine is, did the instrument executed by Charles Abernethy before his death change the beneficiary from Jane A. Abernethy, named in the benefit certificate, to Jennie and Edna McCormick?

The cross-petition of Jane Abernethy avers that Charles Abernethy for some time before his death had been addicted to the intemperate use of intoxicating liquors; that he had for several years contributed but little to her support; that he had become

feeble bodily and mentally; that he had without cause acquired an aversion to her; that his sisters and brothers had stirred him up to strife, and had by undue means and influence forced him into signing several transfers of property, among which was the instrument in question. It is not necessary for us to go over all the evidence bearing upon these propositions. There is evidence tending to show failing mental powers on the part of Charles Abernethy; there is evidence of excessive use of intoxicants, and that he seemed to have an aversion to his wife, so far as appears from the evidence, without cause. But there is no evidence tending to show undue influence, and the mental weakness shown is entirely insufficient to avoid said contract on that account.

Section 5 of the defendant's beneficiary fund law provides that "a member may at any time change, alter or amend the designation of person or persons to whom the benefit named in the certificate is payable, by surrendering said certificate, after having filed or caused to be filed a blank for that purpose on the back of the same, providing for new designation (such designation must be within the class or classes of persons mentioned in Section 13 of the beneficiary fund law), and attach his signature to it."

It was the duty of the secretary of the members branch to attach the seal of his branch to the certificate and forward it to the grand secretary, if in his immediate jurisdiction, and upon receipt thereof by the grand secretary, it became his duty to issue a new certificate.

It is conceded that Jennie McCormick and Edna McCormick come within the designation of Section 13 of the mortuary fund law as persons who may be made beneficiaries. None of the provisions of the above Section 5 were complied with literally. The benefit certificate was in the hands of Jane Abernethy, so that the new designation could not be made on the back thereof, and the assignment was made on a separate piece of paper, which was forwarded to the grand secretary, but before a new certificate could be issued, possibly before the assignment reached him, Charles Abernethy died.

That Charles Abernethy intended to change the beneficiary in said certificate is perfectly clear; that he had a right to do so is equally clear. It is insisted, however, that inasmuch as Charles Abernethy failed to complete the assignment or designation of a new beneficiary before he died and the forms prescribed by the above quoted Section 5 were not complied with, that such designation never took effect.

The parties to the contract of insurance are the insurance association and Charles E. Abernethy. Jane Abernethy had no vested interest in the benefit fund while Charles Abernethy lived; her interest only vested when he died. The law of the association relating to change of beneficiary is for the benefit of the insurance association. The association had an undoubted right to waive a literal compliance with its terms. The association is not claiming anything in this case because of such failure to comply with its terms. By starting this proceeding and asking that the controversy be settled between Jane Abernethy and the McCormicks, it seems to recognize the fact that the assignment by Charles Abernethy might be complete. However that may be, we think that under the law Charles Abernethy having, by the execution of this instrument expressed his intention to change the beneficiary, and having done all he could do to carry out the provisions of the law, his intentions, so expressed, should be carried out. The fact that he died before the formalities required by the law of the association were completed, does not affect the result. The execution of the instrument by him was the essential thing to effect the change of beneficiary; the forwarding of the instrument and the execution of a new benefit certificate were matters of detail. The issuing of a new certificate would have been a vain thing after his death.

The assignment was received by the association. The only objection that could have been made to it was the failure to surrender the benefit certificate. But the benefit certificate was in the possession of Jane Abernethy so that it could not be surrendered.

In the case of *Supreme Conclave, Royal Adelpia. v. Cappella*, 41 Fed. Rep., p. 1, it is said:

“In cases of policies of insurance or benefit certificates issued by mutual benefit societies, the beneficiary has no vested interest in the certificate until the death of the insured member. Up to this time the insured may change his designation of beneficiary at will, and against the consent of such beneficiary.

“The general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association is subject to three exceptions: (1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. (2). If it be beyond the power of the insured to comply literally with the regulations a court of equity will treat the change as having been legally made. (3). If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will treat such certificate as having been issued.”

In *Railroad Company v. Wolfe*, a member of a railroad benefit association held a certificate in which his wife was named as beneficiary. The wife died and he substituted her sister in the manner provided by the laws of the association. He afterwards married after having made an ante-nuptial agreement to designate his wife as such beneficiary. He died, however, before making the substitution, and the court held that the wife and not the sister, was to be treated as the beneficiary. Also that the association having paid the money into court and asked to have the matter settled between the contesting claimants, had waived its rights.

In 15 L. R. A., 350, it is said:

“A designation may be made by will of a new beneficiary to receive the fund to become due by reason of a certificate of membership in a mutual benefit society, although the rules of the order provided for a change by endorsement on the back of the certificate, where through no fault of the member a certificate has become lost or mislaid so that a search for it, at his request, proves unavailing.”

The cases cited are typically bearing upon the issues involved in this case. It is needless to multiply the citation of authorities.

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While it may be conceded that the association might have insisted upon a compliance with its rules, yet it did not do so. It began this proceeding, paid the money into court and withdrew from the contest, saying, in effect, to the parties, fight it out between yourselves. We think this was a complete waiver of all objection to any failure to observe the formalities of the law of the association in the designation of the new beneficiary, and Charles Abernethy having done all that he could to effect the change, his clearly expressed intention to substitute his sister and niece for his wife as the object of his bounty will be carried out.

Judgment affirmed.

#### ACTION FOR REFORMATION OF DEED OR MORTGAGE.

Circuit Court of Cuyahoga County.

EUGENE SCHAWZENBASH V. EMMA B. ASSMUS ET AL.

Decided, May 17, 1909.

*Appeal—Ejectment on Mortgage—Statute of Limitations.*

1. An action for the reformation of a deed or mortgage and recovery of the possession of the premises therein described, presents an issue not triable to a jury, and is appealable.
2. In an action in ejectment brought by the assignee of a mortgage which was not recorded until long after condition broken, the statute of limitations begins to run upon maturity of the note secured by the mortgage.

A. J. Martin, for plaintiff in error.

H. L. Smith, contra.

TAGGART, J. (sitting in place of Marvin, J.); WINCH, J., and HENRY, J., concur.

This case is in this court by appeal from the court of common pleas, and the first question that is presented is upon the motion of the plaintiff to dismiss the appeal herein for the reason that the case is not appealable under the statute.

It is contended on behalf of this motion that this is an action for the recovery of specific real property and that under Section 5130, Revised Statutes, the same is triable to a jury unless a jury be waived. That while the second amended petition seeks a reformation of the mortgage which the plaintiff is asserting in respect to lot 65, no reformation is sought by the action in respect to lot, or a portion of lot 64. But as we construe the description contained in the petition which, it is alleged, is a correct description of the premises, the manifest intention was to describe one parcel or lot of land and not two distinct parcels; therefore, it was necessary to have a correction of this description through the aid of equity before the plaintiff could secure possession of this real estate. That being the case, we think the case is ruled by the case of *Rowland v. Entrekin*, 27 Ohio St., 47:

“In a civil action, where the facts stated in the petition, and the nature of the relief primarily demanded are within the sole jurisdiction of a court of equity, neither party can, of right, demand that the issues of fact made by the pleadings touching the plaintiff's right to such relief, shall be tried by a jury; and, therefore, after final judgment, adverse to the plaintiff, in the court of common pleas, he may appeal such a case to the district court.

“And this right of appeal is not affected by the fact that the plaintiff also demands a money judgment by way of damages to which he may incidentally be entitled, as a result of his obtaining the equitable relief sought.”

See also the case of *Ellsworth v. Holcomb*, 28 O. S., 66 and 69.

The motion to dismiss the appeal is overruled, with exceptions.

The case is also submitted upon the pleadings. The answer to the second amended petition, among other things, pleads the bar of the statute of limitations; that more than twenty-one years have elapsed since the right of action accrued upon said mortgage.

It is claimed by the counsel for plaintiff herein that while this mortgage was executed in 1875, that it was not recorded until 1896, and that as to third parties, it only took effect from the date of the filing of the same with the recorder of the county.

This is not in accord with our views of the case, or with the authorities as we understand them.

The plaintiff seeks to recover possession of this property under this mortgage by reason of the fact of the condition therein being broken and that he is entitled to recover the possession of the premises described therein.

It appears from the pleadings that the mortgage was given in 1875 to secure a note which became due in 1876. At that time the condition contained in the mortgage was broken and the right of the mortgagee to bring ejectment thereby accrued. The statute of limitations at once began to run and having once commenced to run nothing appears in this record that would stop the running of the statute.

In the case of *Bradfield et al v. Hale et al*, 67 O. S., 316, the court lays down the rule, as follows:

“As between the mortgagor and mortgagee, in a mortgage on real property, after condition broken, the legal title to the mortgage premises is in the mortgagee, and he may elect, either to sue for foreclosure and sale, or bring ejectment to recover possession of the premises.

“If his action is in ejectment, the statutory bar of fifteen years as provided in Section 4980, Revised Statutes, does not apply. The bar in such case is twenty-one years as provided in Section 4977, Revised Statutes.”

By the assignment to the plaintiff by the original mortgagee no higher rights were derived by the plaintiff than existed in said mortgagee, and the statute having commenced to run as against an action in ejectment against said mortgagee the same continued against the plaintiff herein, and upon the pleadings herein the defendant was entitled to judgment.

The judgment of the court is that the defendants herein should recover of the plaintiff their costs herein expended, taxed at \$—, and plaintiff pay his own costs. Exceptions will be noted.

**OPTION OF PURCHASE DEFEATED BY IMPROVEMENTS  
MADE ON THE PROPERTY.**

Circuit Court of Williams County.

RHINOLD BANKEY v. J. E. MANON.

Decided, October 31, 1911.

*Specific Performance—Refused Where Enforcement Would be Harsh and Inequitable.*

A decree for specific performance will not be granted, where to compel performance would be extremely harsh, oppressive and inequitable by reason of the fact that the option of purchase was not exercised by the lessee until the lessor, at the request of the lessee, had put in improvements which doubled both the market and rental value of the property, and double rental was paid by the lessee until about the time of the termination of the lease when an attempt was made to exercise the option of purchase.

*John H. Schrider and Newcomer & Gebhard, for plaintiff.  
Bowersox & Peck, contra.*

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

This case is pending in this court on appeal from the common pleas court. It is an action to enforce the specific performance of a contract containing an option to purchase certain real estate, situated in Williams Center, this county. It appears from the evidence that the property was leased by J. E. Manon to certain lessees, and that the lessees assigned to the plaintiff, Rhinold Bankey. This lease was executed on November 1, 1905, and was for one year with the privilege of five, and it contains a clause giving the right of purchase for the sum of \$700 at any time while the contract was in force. The rental reserved in the lease is five dollars per month. Some time after the execution of the lease and after possession was taken under it, the parties agreed to a modification, at least to the extent that the owner was to erect an addition to the building on the premises, and that the rent should be increased to \$11 per month. The improvements were made by the owner, and are conceded by the

plaintiff in his reply to be of the value of at least \$300. We find from the evidence that the value of these improvements, so made by the defendant, is at least the sum of \$700. The increased rental was paid by the plaintiff until the expiration of the lease, or substantially to that date. The plaintiff has elected to exercise the option contained in the lease, and asks from this court that the defendant be required to specifically perform by conveying the premises to him upon payment of the sum of \$700. We think it entirely clear from the evidence that these improvements were made by the defendant, and the value of the premises enhanced accordingly, under circumstances which show that the defendant did not understand that he was still bound, after the change in the rental price and the completion of the improvements, to convey the premises to the plaintiff for the price named in the option. He had good reason to believe and apparently did believe that the substantial improvements made which at least doubled the value of the property, coupled with the change of the rent from \$5 per month to \$11 per month released him from the option in the lease. Under the circumstances existing in this case the plaintiff must not expect a court of equity to compel the transfer to him of property worth at least \$1,400 upon the payment by him of \$700. The agreed rental value of \$11 per month is equal to \$132 per year, which would amount to an income of 8% on a valuation of \$1,650. The later rent paid amounts to nearly 20% on the sum of \$700, which is the amount offered by the plaintiff, in return for which he demands the conveyance of these premises. It is clearly a demand that a court of equity should do that which is inequitable. We call attention to the following cases: *City of Tiffin v. Shawhan*, 43 O. S., 178; *Hughes v. Roth*, 18 C. C. R., 804.

To compel the specific performance of the agreement contained in the lease would be extremely harsh, oppressive and inequitable. The defendant in this case filed a motion for judgment upon the pleadings in his favor, and we think he is not entitled to have the same granted. Upon the merits of the case, however, we find for the defendant, and refuse specific performance.

**ERRONEOUS CHARGE ON A MINOR ISSUE.**

Circuit Court of Cuyahoga County.

**E. SHRIVER REESE v. THE MANNEN & ESTERLY COMPANY.\***

Decided, May 17, 1909.

*Charge—Several Issues and Erroneous Charge as to One—Prejudicial Error, When.*

Where there are several distinct issues in a case, the overruling of a motion to properly direct the jury upon one of them is not prejudicial, unless such motion was in regard to a controlling issue in the case; whether such issue might or might not be controlling, depends upon the issues before the jury.

*E. J. Pinney*, for plaintiff in error.*Smith, Taft & Arter*, contra.

**TAGGART, J.** (sitting in place of Marvin, J.); **WINCH, J.**, and **HENRY, J.**, concur.

The only error complained of in oral argument by counsel for plaintiff in error was the failure of the trial court to properly instruct the jury in respect to the durability of a furnace which was involved in the case. The petition in the common pleas court was on an account for \$39. The answer, in respect to the account, denied that there was \$39 due the plaintiff, but admitted that there was \$9 due and no more. The defendant further answered and by way of counter-claim alleged a warranty in respect to a gas furnace which he claims the plaintiff below agreed to install in his house, and as a part of said contract, warranted that said furnace would comfortably heat said house in zero weather without crowding, and as a further part of said contract guaranteed that said furnace was well made and of good material and would last for several years, and would not need repairing.

Plaintiff in its reply denied that there was any warranty or guaranty in respect to said furnace.

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\*Affirmed by the Supreme Court without opinion, *Reese v. Mannen & Esterly Co.*, 83 Ohio State, 448.

The bill of exceptions does not contain all the evidence that was heard in the court of common pleas. It is stated that there was only so much of the evidence brought into the bill of exceptions as would have a tendency to show the errors complained of; that is, that there was evidence introduced in behalf of the defendant below that there was a warranty or guaranty of durability, and that the failure of the court to charge in respect to the durability of the furnace was erroneous and prejudicial.

But we think, taking the charge of the court as an entirety, that the court does charge in respect to the construction and durability of this furnace, and while it is not so clear and explicit in that regard as might be desired, yet there was no request to the trial court to more explicitly charge the jury in that regard. The court does charge as to the words or expressions that are necessary to constitute a warranty, and this charge is as applicable to the warranty of durability as to the warranty of efficiency on the part of the furnace to be installed, and the jury were at liberty to appropriate these instructions as to that issue in the case as well as to the other. It is said that the question of the efficiency of the furnace, as to its heating the houses comfortably in zero weather, was abandoned by the defendant in the trial of the case. The bill of exceptions does not so advise us. True, the defendant himself in his testimony admits that after the second furnace was put in, the house was heated quite satisfactorily. But that admission in the trial of the case is quite different from the abandonment of a defense filed in the case; so that, so far as the bill of exceptions discloses, the case proceeded upon the defense made in the answer of the warranty of efficiency and warranty of durability and the court's charge was upon the issues as made.

With these two claims on the part of the defendant that there was a warranty of efficiency and a warranty of durability, even assuming that the charge is not clear and explicit in respect to the latter, yet we hold that there was no prejudicial error. The jury may have found that there was a warranty as alleged in respect to the heating of the house and may have found that

there was no warranty in respect to the durability. The reply made an issue on both of these propositions. The verdict is a general verdict.

Where there are several distinct issues in a case, the overruling of a motion to properly direct the jury upon one of them is not prejudicial, unless such motion was in regard to a controlling issue in the case; whether such issue might or might not be controlling depends upon the issues before the jury. See *Clark v. Clark*, 16 C. C. Rep., 103; *Beecher v. Dunlap*, 52 Ohio St., 64, 65; *McAllister v. Hartzell*, 60 Ohio St., 69, and 23 Ohio St., 626.

Finding no error in this record to the prejudice of the plaintiff in error, the judgment is affirmed with costs, and remanded.

#### PROCEEDINGS RELATING TO THE TAKING OF A DEFAULT JUDGMENT

Circuit Court of Cuyahoga County.

THE K. B. COMPANY v. GEORGE DIXON.

Decided, November 13, 1911.

*Appeal From Justice of the Peace—Filing Petition Out of Rule—Action for Money Had and Received—Allegation of Amount Due Specific—Proof on Default—Judgment as Upon Default Under General Code, 11592.*

1. In an action appealed from a justice of the peace to the common pleas court, since the latter court has power to grant leave to file a petition out of rule, it has power to take up and consider it when it is filed out of rule, without first making an order on the subject.
2. Where a vendee of personal as well as of real property has a right, in consequence of the conduct of the vendor, to rescind, he may do so and recover back in an action for money had and received, the amount paid upon the contract.
3. Where the allegation in a petition of the amount due is material and specific and not, in the sense in which those words are used in General Code, Section 11329, an allegation of value or damage, the action being on an implied contract for the payment of money only, and within the exception of General Code, Section 11357,

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under the provisions of General Code, Section 11329, it must be controverted by answer, and if not, the court, in the exercise of its discretion, has power to render judgment without proof of the amount.

4. General Code, Section 11592, authorizing judgment *as upon default* in certain cases, does not contemplate the entering of a default judgment at any time during the term after the defendant is in default for answer, as provided by General Code, Section 11383, but only when the case is reached in its order or on special assignment.

*H. A. Kangesser*, for plaintiff in error.

*E. W. Dissette*, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

Error is predicated in this action upon the refusal of the common pleas court to vacate a default judgment rendered within the term.

The case was originally started in a justice court, where George Dixon sued the K. B. Company for "money had and received." He recovered judgment on January 31, 1911. The defendant appealed.

General Code, Section 10398, provides:

"The rule day for filing the petition in the court of common pleas in a case appealed from a justice of the peace shall be the third Saturday after the expiration of the time limited for filing the transcript; and the subsequent pleadings shall be filed within such times thereafter as is provided for the filing thereof in cases commenced in that court after the return day of the summons."

Dixon should have filed a petition in the common pleas court by February 25; he did not file it until March 30, 1911. The third Saturday after that, when the answer was due, was April 15; the default judgment complained of was taken the following Monday, April 17.

It is first claimed that the judgment is erroneous because the plaintiff did not file his petition so soon as he should have filed it. This contention is disposed of by the ruling in *Parker v. Haight*, 14 C. C., 548, which we follow.

It is next claimed that the cause of action stated in the petition varies from that set up in the bill of particulars, and that it was not such an action as permitted a default without the taking of evidence.

Neither of these points is well taken. The petition set forth that the plaintiff had purchased an overcoat of the defendant and paid down four dollars of the purchase price, but the defendant refused to deliver the overcoat, and the plaintiff therefor asked judgment for his four dollars. This was an action for money had and received.

It was said by Judge Hitchcock in the case of *Welsh v. Welsh*, 5 Ohio, 425, at page 428:

"The law is well settled that where a vendee has a right in consequence of the conduct of the vendor, to rescind, he may do it and recover back, in an action for money had and received, the amount paid upon the contract."

That was an action concerning the sale of real estate, but the rule is the same in the case of the sale of a chattel.

Underlying this action is an implied contract; if another has money which in equity belongs to me, the law implies a contract to pay it to me. This proposition is important, and authorizes the paraphrasing of a paragraph found on page 638 of the opinion in the case of *Dallas v. Furneau*, 25 O. S., 635, as follows:

"The allegation in the petition of the amount due is a material allegation and is not, in the sense in which those words are used in Section 11329 of the General Code, an allegation of value or damage, but is a specific allegation of the amount due, the action being on an implied contract for the payment of money only, and within the exception of Section 11357 of the General Code, and therefore, under the provisions of Section 11329 of the General Code, must be controverted by the answer. In this case, the material allegations of the petition not having been controverted by the answer, the court, in the exercise of its discretion had power to render the judgment without requiring proof of the amount."

This brings us to an application of General Code, Section 11592, which provides that when all or a part of one or more of the causes of action set out in a pleading are not put in issue

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by answer, or otherwise, judgment may be taken, *as upon a default*.

If it is claimed that this section applies only to cases where a part of the cause or causes of action is admitted and part denied, as set forth in *Weaver v. Carnahan*, 37 O. S., 363, the answer is that the statute has been amended since said decision.

The plaintiff in this case, then, was entitled to judgment, *as upon default*. That does not mean that he was entitled to a default judgment at any time during the term after the defendant was in default for answer, as provided in General Code, Section 11383, because his action was not one of those mentioned in that section, but he was entitled to judgment *as upon default*, when his case was reached in its order or on special assignment, as provided in General Code, Sections 11384 to 11388 inclusive.

It is claimed that this case was not reached in its order or specially assigned. The transcript does not show a special assignment; but, as there is no bill of exceptions, we do not know that the case was not reached in its regular order. We must therefore presume that the case was not disposed of in advance of the proper time.

Judgment affirmed.

**CONSTRUCTION OF A WILL.**

Circuit Court of Wood County.

**FRANK WHITE, AS ADMINISTRATOR WITH THE WILL ANNEXED OF  
THE ESTATE OF HENRY RUDOLPH WHITE, DECEASED,  
v. JOHN WHITE ET AL.\***

Decided, October 28, 1911.

*Wills—Determination as to the Amount the Widow of a Deceased Son  
Should Receive—Where the Son Died Before the Testator.*

Under the provisions of the will construed in this case, the widow of the deceased son is held to be entitled to receive the share which would have gone to the said son had he survived the testator, less the amount specially provided to be paid by her in the codicil appended to the will after the death of said son.

*Rheinfrank & Ohlinger and Edward Beverstock, for plaintiff.  
Edgar H. Johnson and Jos. W. Lane, contra.*

**RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.**

Appeal from the Court of Common Pleas.

This is an action brought for the purpose of obtaining a construction of the will of Henry Rudolph White, deceased. The will was executed on July 23d, 1894, on which date the testator had five children then living. The will, after making various preliminary dispositions of property, contains the following clause:

"The remainder of my estate, real and personal, shall be divided equally between my children or their heirs share and share alike."

One of the children of the testator by the name of Henry White died intestate on June 3d, 1895, without issue, but leaving surviving him a widow, Rose White. On December 21, 1895, the testator, Henry Rudolph White, executed a codicil to his will, which codicil contains the following language:

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\*Affirmed without opinion, *White v. White*, 88 Ohio State, —.

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"The sum of \$88 lawful money of the U. S. bearing interest at 6% from the first day of July, 1895, till paid shall be paid to my daughter Carolina White, her heirs or assigns, out from the share of the inheritance of my son Henry White, deceased. The residue of said share shall be the only bequest to the heirs or assigns of said Henry White."

**Held:** That under the terms and provisions of the will and codicil, the widow, Rose White, is entitled to receive the share which would have gone to her husband, Henry White, if he had survived the testator, less the sum of \$88 and interest thereon as provided in the codicil.

This construction of the will is not changed by the extrinsic evidence offered. So much of that evidence as tends to show the situation, circumstances and condition of the testator and the natural objects of his bounty, is competent, the remaining portion of it we hold to be incompetent, and we cite the following cases: *In re Lester's Estate*, 115 La., 1; *Lincoln v. Aldrich*, 149 Mass., 368; *Clark v. Trustees*, 3 C. C., 152.

A decree may be drawn construing the will in accordance with the views expressed in this opinion.

**AS TO NOTICE TO ENDORSERS OF NON-PAYMENT AND  
WAIVER OF DEMAND**

Circuit Court of Cuyahoga County.

**C. H. SALMONS v. A. J. BROCKETT ET AL.**

Decided, November 13, 1911.

*Promissory Note—Waiver of Demand and Notice of Non-Payment and Dishonor.*

In an action on a promissory note waiver by evidences of notice of dishonor and non-payment and demand is not sufficiently alleged by a statement that on a day just prior to maturity of the note one of three endorsers offered a renewal note with the same endorsers for part and the note of another for the balance of the amount of the original note, with a statement that the maker of the original note could not pay it, requesting that a new note be accepted in place of the original note, which request was refused.

*Griswold & White, for plaintiff in error.**Judson & Weld, contra.***WINCH, J.; HENRY, J., and MARVIN, J., concur.**

The question in this case is whether a demurrer by defendant Brockett to plaintiff's amended petition was properly sustained.

It declares upon two promissory notes for \$2,200 each, both executed July 20, 1904, by the Cleveland Printing & Publishing Company, payable to the plaintiff four months after date, which would be November 20, 1904, and both endorsed by defendants, W. M. Day, F. J. Staral and A. J. Brockett.

The question raised by the demurrer is whether said petition sufficiently alleges that notice of dishonor and demand were waived by the endorsers.

On this point the petition reads as follows:

"Each of said endorsers waived the notice of dishonor and non-payment and demand required by the statute to be given them in this, to-wit: That on or a day or two prior to November 20, 1904, the date when the within notes became due, W. M. Day, one of the three endorsers to the aforesaid notes, and the

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president and treasurer of the Cleveland Printing & Publishing Company, brought three renewal notes, two for two thousand dollars (\$2,000) each, dated November 20, 1904, with the same endorsers on the back, and one for four hundred dollars (\$400) endorsed by Luther Allen, and requested this plaintiff to accept said three notes in place of the two original notes herein described, and stated to this plaintiff that the Cleveland Printing & Publishing Company, of which he was the president and treasurer, could not pay the original notes above set forth when due on November 20, 1904. This plaintiff thereupon rejected and refused to accept the renewal notes."

The law on this subject is now found in General Code, Sections 8187 and 8214.

Section 8187 provides that presentment for payment is dispensed with by waiver, express or implied.

Section 8214 reads as follows:

"Notice of dishonor may be waived either before the time of giving notice has arrived, or after the omission to give due notice. The waiver may be express or implied."

It is claimed that in this case the waiver of demand was implied from the knowledge of the endorsers that the notes would not be paid at maturity, waiver of notice of dishonor from the conduct of the endorsers in offering renewal notes endorsed by themselves.

The first point is not well taken. It was held in the case of *Bassenhorst v. Wilby*, 45 O. S., 333:

"The known insolvency of the maker, and that he himself can not pay, does not dispense with the necessity of presentment for payment in order to fix the liability of the endorser."

The second point, waiver of notice of dishonor, may be implied, as quoted by counsel for plaintiff, from *Boyd v. Bank*, 32 O. S., 526, "if the conduct on the part of the endorser toward the holder of the note is calculated to put a person of reasonable prudence off his guard, or induce him to omit demand, or to give notice of dishonor."

But was there any such conduct in this case? What did the indorsers do? They offered two renewal notes for part of the

sum due, and a note indorsed by Luther Allen in payment of part of it. This the plaintiff refused to accept. It does not appear that Brockett was promptly notified that these three notes were not accepted. Was he not hereby lulled into temporary security instead of plaintiff's being put off his guard?

In the case last cited, Boyd, when asked by one of the makers to indorse a renewal note, *which it had agreed to accept in payment of the note sued upon*, promised to do so, and told the maker to leave the note at the bank and he would come in in a few days and indorse it.

The note was left at the bank, and it was informed of Boyd's agreement. The day for demand and notice went by, the bank relying upon Boyd's promise to endorse the renewal note. He afterwards refused to endorse it. Judge Wright delivering the opinion, justly remarks: "Had he kept his word and endorsed the note on Monday, the necessity of notice and protest was waived."

But had the bank not agreed to accept a new note endorsed by Boyd, it would not have been misled by Boyd's failure to go in on Monday and endorse the note. So here plaintiff was in no way misled by the tender of the new notes endorsed by Brockett, for he refused to accept them, and had plenty of time after his refusal to demand payment of the original notes, and give notice of their dishonor.

The case of *Jenkins v. White*, 147 Pa. St., 303, is cited by counsel for plaintiff as sustaining his claim. The syllabus of the case reads as follows:

"The offer of a renewal note with the *same* makers and endorsers as the original note, constitutes a waiver of protest. Such an offer shows that the endorsers did not expect the original note to be paid at maturity, and they could not have been injured by the failure to give notice of its non-payment."

This is not in accord with the Ohio rule announced in *Boyd v. Bank*, *supra*, which bases the waiver upon the fact that the holder was misled by the conduct of the endorser and not upon the fact that the endorser is not prejudiced by the failure to give notice. The latter, in Ohio, at least, is entitled to stand

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upon his legal rights, unless his conduct was misleading to the holder to his prejudice.

The case is also distinguishable from the case at bar in that the renewal not tendered was identical with the original note in amount. Here the endorser tendered new notes for only part of the original notes, expecting the balance thereof to be paid by the Luther Allen note.

The case of *First National Bank v. Weston*, 49 N. Y. Supp., 542, was upon the *original* note, although destroyed upon the giving of a renewal note with the same endorsers, and although there had been many subsequent similar renewals, all accepted by the bank. Of course, notice of dishonor of the first note was waived, for the holders acted upon the proposal of the endorsers. The case is in line with the Boyd case.

The case of *May v. Boisseau*, 8 Leigh (Va.), 164, is in point and in line with the Ohio cases.

The demurrer to the amended petition was properly sustained, and the judgment thereon is affirmed.

**COMPENSATION FOR CARE AND SERVICES RENDERED  
TO A DECEDENT.**

Court of Appeals for Hamilton County.

**JOHN R. SAYLER, EXECUTOR, v. LUCY E. SELLERS.\***

Decided, March 14, 1914.

*Implied Contract—For Compensation for Services in Caring for an Aged Couple—Action on Agreement to Make Testamentary Provision Barred by the Statute—Quantum Meruit—Evidence as to the Nature of Services Rendered as Evidence as to Their Value—Judgment Embodying Substantial Justice Based on a Wrong Process of Reasoning.*

1. An action does not lie on an agreement to make testamentary provision for compensation for services in caring for the decedent and his wife in their old age, where the suit to enforce the agreement was not filed for more than two years after the appointment of the executor and more than six months after the rejection of the claim by the executor.
2. But where the court found on all the issues, including quantum meruit, for plaintiff and rendered judgment in an amount which embodied substantial justice based upon conclusions which were substantially correct, a reviewing court will not set the judgment aside on the ground that the court erred in a matter of law or logic.

*Peck, Shaffer & Peck and Saylor & Saylor, for plaintiff in error.*

*Healy, Ferris & McAvoy, contra.*

JONES, E. H., J.; SWING, J., concurs; JONES, O. B., J., dissents.

The amended petition filed by the plaintiff, Lucy E. Sellers, in the court below concluded with an alternative prayer for one of three different orders or judgments: first, for an order compelling the defendant executor to deliver to her one hundred and fifty shares of the capital stock of the First National Bank of Cincinnati; second, "if this relief can not by law be granted that she recover of defendant the sum of \$37,500 the value of

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\*Affirming with modification, *Sellers v. Saylor, Executor*, 14 N.P.(N. E.), 1.

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said shares''; third, if such relief can not be granted that she recover from defendant the sum of \$28,921, being the value of her services less the amount received by her with interest from August 11, 1909. There were allegations in the amended petition upon which this alternative prayer was predicated.

Answers were filed by each of the defendants setting forth substantially the same defense to the amended petition of the plaintiff. The answers are long, containing eight separate defenses, which we will not take space to set out verbatim. The contents of the answer will sufficiently appear from the discussion which follows.

The prayer for delivery of the bank stock or judgment for the value thereof was based upon a written instrument signed by Mr. Van Wormer on the 16th day of September, 1907, of which the following is a copy:

“SEPT. 16, 1907.

“In addition to the seven thousand dollars invested in 3½% Cin'ti viaduct bonds, one hundred dollars invested in a United States Government bond and sixty shares of Cin'ti Street Railway stock, I Asa Van Wormer, give and bequeath to Lucy E. Sellers for taking care of me and my home, at my death, one hundred and fifty shares of First National Bank stock. If Lucy E. Sellers should die before I do, then at my death the one hundred and fifty shares of First National Bank stock goes to her daughter Stella Sellers.

“(Signed) ASA VAN WORMER.”

This was not witnessed, and although testamentary in form no claim is made that it should be treated as a codicil to testator's will. It is claimed, however, in the amended petition that, at the time of its execution, Mr. Van Wormer agreed to make a codicil to his will incorporating its provisions and bequeathing to Mrs. Sellers the bank stock therein mentioned. It is upon this alleged promise that the prayer for the delivery of the stock is based, the claim being that the executor since the death of Mr. Van Wormer has held said stock in trust for Mrs. Sellers.

The testator, Asa Van Wormer, died on the 11th day of August, 1909. John R. Sayler, named as executor in the will, was appointed September 18, 1909. On September 22, 1910, Mrs.

Sellers presented to said executor a claim for \$28,921 for labor performed and services rendered to Asa Van Wormer from April 13, 1897, until August 11, 1909. This claim was disallowed October 20, 1910, and on November 30, 1910, the original petition of Lucy E. Sellers, plaintiff below, was filed against said Saylor, executor, in which she sought to recover said sum of \$28,921, with interest from August 11, 1909.

The defendant below admitted in his amended answer the presentation and rejection of this claim. In his sixth defense he admits that plaintiff, Lucy E. Sellers, exhibited to him a paper purporting to be the original of said instrument of date September 16, 1907, set out above, and says that:

"Thereupon this defendant orally disputed and rejected the same, and said to the plaintiff that the instrument was of no validity, and refused to indorse thereon his allowance of it as a valid claim against the estate."

Further answering, he claims:

"That the said plaintiff failed to bring an action against this defendant on a cause of action growing out of a failure and neglect on the part of Asa Van Wormer to perform any agreement under or evidenced by said instrument with respect to one hundred and fifty shares of the First National Bank stock within six months thereafter.

"That no other exhibition of said instrument or of a claim under said instrument was made to this defendant.

"Wherefore this defendant says that any claim growing out of or evidenced by said instrument is barred."

In the seventh defense the executor denies that said Asa Van Wormer agreed to make a will giving plaintiff at his death one hundred and fifty shares of stock of the First National Bank of Cincinnati, or that he agreed with the plaintiff that he would have a codicil to his will executed in due form, etc.

In the eighth defense the executor says that he was appointed on the 18th day of September, 1909; that he caused notice of his appointment to be published in a newspaper of general circulation, commencing on the 19th day of September, 1909, as required by statute; that the said plaintiff failed to bring action against said defendant within two years, on a cause of action

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growing out of a failure and neglect on the part of Asa Van Wormer to perform an agreement, as set out in the petition.

We think these defenses as to the agreement to make a will or codicil giving Mrs. Sellers the bank stock are a bar to her recovery upon that claim, as it is conceded that the amended petition in which said claim was first sued upon was not filed until more than two years after the appointment of the executor and more than six months after the rejection of said claim by him; the court below was therefore not warranted in basing its judgment in favor of the plaintiff upon this alleged agreement.

The case was submitted below upon all the issues joined, without the intervention of a jury. We say this mindful of the fact that it is contended by counsel for plaintiff in error that the case was tried below only upon the new matters set up in the amended petition, viz., upon the claim for the bank stock or its equivalent.

The record however discloses that evidence was offered in the trial below as to the terms of the contract of employment, and not only describing the services rendered thereunder by Mrs. Sellers for twelve years as the nurse and housekeeper for Mr. and Mrs. Van Wormer, but detailing with particularity the arduous and exacting labor and constant attention that were required of Mrs. Sellers. We can see no reason why it would have been considered necessary by plaintiff to have offered this testimony nor by the court to have spent the time in receiving it, unless it was to be applied to a determination of the claim for services upon *quantum meruit* as originally presented to the executor and as alone sued upon in the original petition and incorporated in the amended petition in the action in the court below. The court in the judgment entry found as follows:

*"This cause having heretofore been heard upon the pleadings and evidence and submitted to the court, the court upon consideration thereof finds the issues joined in favor of the plaintiff and that the facts stated in her amended petition are true."*

This language is not ambiguous, and embraces with certainty a finding for plaintiff on her claim for *quantum meruit*, as well as upon other issues.

There is no rule which authorizes a reviewing court to reverse a judgment simply because the court which rendered it erred in a matter of law or logic. Section 11364, General Code, provides:

"In every stage of action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed, or affected, by reason of such error or defect. In the judgment of any reviewing court upon any petition in error in any civil action, when it is sought to reverse any final judgment or decree, or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of proceedings, and judgment under review. In case such reviewing court shall determine and certify that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded and such judgment or decree under review shall be affirmed, or it shall be modified if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining."

The questions therefore for this court are: has substantial justice been done; and are the conclusions ultimately reached, regardless of the reasons given, substantially correct?

Following, as we think, the letter and spirit of the section quoted a majority of this court are constrained to affirm the judgment below and to answer these questions in the affirmative.

We have reached this conclusion after careful consideration of all the evidence in the case. Mrs. Sellers under the statute was incompetent as a witness, and her daughter, Mrs. Blaesi, was the only witness to the conversation which took place between Mr. Van Wormer and Mrs. Sellers at the time the contract was made. She testified that Mr. Von Wormer said:

"He wanted my mother to take care of him. Come out there and take care of him, and do for him and Aunt Julia as long as they lived; that if they did this, at his death she would be rewarded, and he knew that she could do anything for him, and that she would be satisfactory in every way, and he would satisfy her in return by giving her at his death enough to keep her the rest of her life without doing any work. So mama came, and I am

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not quite sure about the date, but I think it was along about the 11th of April that mama and I went there and took charge of Annt Julia and Uncle Asa in his home. \* \* \* so he said if she would remain and do for him, at his death she would get stocks or bonds that would yield an income from \$150 to \$200 a month, if she would stay and take care of him." (Bill of Exceptions, pages 8 and 9.)

This evidence is corroborated by the testimony of James Van Wormer and Mrs. Atherton as to what Mr. Van Wormer had told them as to his arrangement with Mrs. Sellers and what he had agreed to do in conformity thereto, and is not disputed by a word or circumstance in the record. The conversation detailed by James Van Wormer, and found on pages 85, 86 and 87 of the bill of exceptions, shows that the old gentleman at that time (August, 1907, one month before the execution of the unattested codicil) recognized an indebtedness to Mrs. Sellers, and contemplated making some arrangement by which she would receive at his death \$50,000 from his estate for her services performed and to be performed.

Within fifteen months from the date of her employment he had made provision for her in his will to the extent of \$8,000 and had given her a \$1,000 bond. At that time he was seventy eight years of age. He outlived his expectancy, and it not likely that he then expected to live to be ninety years of age. While the bequests and the gift *inter vivos* thus made can not be taken as absolute proof of the value of her services, they show that the old gentleman recognized the extraordinary nature of her labors and did not measure the value thereof by the usual standards or by any prevailing rule or custom. The evidence shows that these bequests were made in compliance with his agreement or promise as testified to by Mrs. Blaesi, and when we witness them, made, as they were so shortly after she entered upon her work, it serves to remove any feeling of surprise or doubt as to his purpose expressed nine years later to give the \$37,500 worth of bank stock in further payment under his contract.

The record shows further that Mrs. Sellers knew of each of the testamentary bequests made for her at the time or soon after they were made. She objected strenuously to them as being in-

adequate and not a fulfillment of his promise or of the contract of employment. What did he say or do? Did he deny the agreement as she claimed it existed? No. On the contrary he gave her bonds, stocks, and made codicils in an effort to satisfy her, but to no avail. There was constant trouble about it. He may have thought her demands were unreasonable or exorbitant, but she insisted that he had not kept faith and at one time left him, removing her furniture and apparel to the city. He soon after induced her to return. Her services were apparently considered by him as almost if not quite indispensable. There were quarrels, a fight and much domestic turmoil in the household up to the time that the paper of September 16, 1907, was signed. The record is silent as to any trouble afterwards and the inference follows that both parties looked upon that paper as a settlement of the difficulty. The amount named therein was less than that fixed by him in the conversation with his friend a month before. It must be accepted as his estimate of what his agreement, made in 1897 and since recognized by him, required him to do. We can not see how any better evidence could have been offered as to the value of her services, and as to its admissibility for such purpose there can be no doubt.

Plaintiff below was not required to offer opinion evidence as to the value of the services. He expressly agreed to provide liberally for her, insuring an income sufficient to meet her needs. This promise, together with the unusual and diversified duties of her employment, its uncertain duration, the postponement of payment until his death, all make obvious the futility of such evidence in this case and the reason same was not offered. Evidence as to the nature of the services was evidence of their value. It is not necessary in a suit on a *quantum meruit* to offer more. *McIntyre, Ex'r, v. Garlick*, 8 C. C., 416; *Dukme Jewelry Co. v. Hazen*, 6 C.C.(N.S.), 606.

The amount claimed in the amended petition is \$28,921 with interest. This sum was arrived at by charging for the number of days from April 13, 1897, until August 11, 1909, to-wit, 4503 days, at \$7 per day, and crediting thereon the sum of \$2,600

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which Mrs. Sellers had received in cash on account during this time.

On December 14, 1898, Mr. Van Wormer made a codicil to his will by which he gave to Mrs. Sellers United States government bonds of the face value of \$7,000. This codicil expressly provided that this bequest was made in consideration of her services in keeping house for him and that it was to be paid to her upon his death in the event that she remained with him until that time. This codicil was afterward revoked or became inoperative for the reason that the bonds named therein were about to be called for redemption, and on May 25, 1907, in lieu thereof he entered into a trust arrangement by which he placed said bonds in care of the Third National Bank of Cincinnati, Ohio, with power to reinvest the amount received for such bonds in other bonds of the United States or of the city of Cincinnati.

Under the powers contained in said deed of trust the trustee at the maturity of the United States bonds surrendered the same and reinvested the proceeds in Cincinnati viaduct bonds to the amount of \$7,000, and one United States 3% coupon bond in the sum of \$100, and held the same until after the death of Asa Van Wormer, and until the 7th day of February, 1910, when the said trustee transferred and delivered said bonds to Mrs. Sellers.

The trust instrument above referred to contained a copy of said codicil of December 14, 1898, and expressly recited that the trust was created for the purpose of carrying out the said bequest, and as a payment to Mrs. Sellers for services which she had rendered and might render in the future.

Under these circumstances we think that the sum of \$7,100 heretofore received by Mrs. Sellers should have been credited upon said account presented to the executor as aforesaid, and the same not having been done, it should now be considered as a credit upon said account in the same manner as the item of \$2,600 deducted therefrom by claimant. This reduces the claim of defendant in error to \$21,821, and the judgment of the court below should be modified to the extent that it is in excess of this amount.

Plaintiff is entitled to recover the said sum of \$21,821 with interest from August 11, 1909.

Judgment affirmed as modified.

JONES, O. B., J.; dissenting.

The original petition in this case was the usual one for services on *quantum meruit*. It was superseded by the amended petition which still embodied all that was contained in the original petition, setting up plaintiff's claim under an implied contract and then proceeding further sought in payment for the same services to show an express contract for the transfer and delivery of certain bank stock, and prayed in the alternative, first, for the delivery of that stock; or, if that could not be had, for a judgment for the value of the stock; and if that could not be had, for the value of the services rendered on a *quantum meruit*.

It will be seen that the new matter in the amended petition is not in explanation or in furtherance of that contained in the original petition, but is actually inconsistent with it. If plaintiff had an express contract for this bank stock in payment for her services, she had no implied contract for \$7 per day, or whatever their value might be. In *Creighton v. Toledo*, 18 O. S., 451, the first paragraph of the syllabus is as follows:

"Where there is an express contract between parties, none can be implied; the maxim *expressum facit cessare tacitum* applies in such cases."

And on page 452, in its opinion, the court says:

"The plaintiff's right to recover is not founded upon a *quantum meruit*, but solely upon an express contract which provides a stipulated mode of payment, and thus excludes the idea of a recovery upon an implied assumpsit. When there is an express contract between parties, none can be implied; the maxim *expressum facit cessare tacitum* applies in such cases."

And in *Crist v. Dice*, 18 O. S., 542, in the opinion of the court the following language is used: "No implied obligation inconsistent with the actual agreement can arise," etc., \* \* \* "for *expressum facit cessare tacitum*."

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The allegations of the express contract and the implied contract in the same petition are inconsistent. They are in no sense the same, but are repugnant to each other. They do not constitute two separate causes of action, but are two distinct causes of action pleaded together in the alternative, and relief under one cause of action would prevent the obtaining of it under the other. Plaintiff being uncertain as to which cause of action she might be able to prove and maintain, out of abundance of caution pleaded them both in the one amended petition. And they were both met by distinct denials.

As to the cause of action under the unexecuted codicil for an express consideration, the defendant interposed the bar of the statute both that the action had not been begun within six months after its rejection under Section 10722, General Code, nor within two years after the appointment, under Section 10746, General Code.

I concur with the majority of the court that these sections both constituted a complete bar. *Shahan, Ex'r, v. Swan*, 48 O. S., 25; *Delaplaine v. Smith*, 38 O. S., 413; *Pollock v. Pollock*, 2 C. C., 140.

The only recovery would, therefore, be sustained under an implied contract, as set out in the original petition.

In my opinion there was no consideration given by the court below to the claim under the implied contract, nor any determination by it as to the value of the services rendered or the amount which plaintiff was entitled to receive for same. On the contrary, the court below found that plaintiff was entitled to recover as damages the value of the bank stock which had not been delivered to her in accordance with the agreement which she was barred by the statute from setting up in this case. To my mind this is clear from the words alone of the judgment, and becomes doubly so when we refer to the language of the court below in its opinion as reported in 14 N.P.(N.S.), 1. The judgment below was based upon the finding of the court made in the following language:

"This cause having heretofore been heard upon the pleadings and evidence and submitted to the court, the court upon consider-

ation thereof find the issues joined in favor of the plaintiff, and that the facts stated in her amended petition are true.

"The court further find that the estate of Asa Van Wormer is liable in damages for the value of the stock delivered to the plaintiff in accordance with the agreement in the amended petition set forth, and that therefore there is justly due and owing to the plaintiff from the defendant John R. Sayler, executor of the last will and testament of Asa Van Wormer, deceased, upon the cause of action set forth in the amended petition, the sum of \$35,250 and that the plaintiff is entitled to have said sum paid to her out of the personal property belonging to the estate of the said Asa Wormer," etc.

Surely this judgment must be read as an entirety, and it will not do to simply rely upon the general language of the first paragraph of the finding, and from it determine that the court below had necessarily found upon the claim based upon the implied contract for a *quantum meruit*.

It is true that the language states that the court upon consideration of the pleadings and the evidence "find the issues joined in favor of the plaintiff, and that the facts stated in her amended petition are true."

If this language is to be construed as broadly as it has been by the majority of the court, then it necessarily means that the court below found that the express contract to pay bank stock for services had been established, and that the implied contract to pay the reasonable value for the same services had also been established. These two findings are absolutely inconsistent, and this is shown conclusively, to my mind, by the specific language which follows, wherein the court finds "that the estate of Asa Van Wormer is liable in damages for the *value of the stock not delivered* to the plaintiff in accordance with the agreement in the amended petition set forth, and *that therefore* there is justly due and owing to the plaintiff," etc.

Construing these two paragraphs together shows specifically which one of the two inconsistent causes of action put in the alternative in the amended petition was found in favor of the plaintiff to be true. And the value of this stock, as fixed by the testimony of the witnesses, shown in the record, is the amount for which the judgment was entered.

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In other words, the cause of action which has been barred is used as a basis for the foundation of the judgment below. While it is true that there is sufficient evidence shown in the record to have enabled a jury or court on submission to determine the value of the services rendered by plaintiff in her action on an implied contract for the value of such services, the record fails to show any consideration of that evidence for the purpose of fixing such value. It will not do to say that the unexecuted codicil furnishes in itself a basis of value, as we have seen, it is eliminated from the case by reason of the bar of the two statutes above mentioned except in so far as it might furnish evidence that the decedent recognized some obligation, whether as a legal liability or as a moral duty.

This paper is not contractual in its form, but is of a testamentary character. The record shows that testator was constantly considering how he should dispose of his large fortune, and it is but natural that plaintiff should have been considered among others as well worthy of his benefaction. The testimony of James Van Wormer as to his conversations with testator indicate that he was not considering the value of plaintiff's services to himself, but rather undertaking to determine what portion of his estate he should bestow upon her, while making generous gifts to other individuals and to numerous charities.

The opinion of the court may be resorted to, to show what was adjudicated. *Topliff v. Topliff*, 8 C. C., 55.

In the syllabus of the opinion of the court below it is stated:

• • • "The compensation thus provided was larger than she could have expected on a *quantum meruit*.

• • • "The agreement must be regarded as established and the estate as liable in damages for the value of the stock so promised, notwithstanding her mercenary motive, the excellent bargain she drove, and the defective character of the agreement upon which she relies."

And in the body of the opinion on page 9, the following language is used:

"Except that the agreed compensation is large, and greater probably than could be given in an action for the reasonable value of such services, there would be little hesitation in finding the agreement to be as claimed."

It therefore seems to me that the judgment below was based entirely upon a wrong hypothesis; that the court found an express contract and therefore gave no attention to any proof as to the value of services under an implied contract. And while it is the duty of this court, under Section 11364, General Code, to "disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." I can not bring myself to believe that a trial based upon a wrong theory, wherein the real issue that can be determined by the court is disregarded, and a judgment rendered on an issue which can not under the law be considered, is one where the "substantial rights of the adverse party" are not affected, and this even though the amount of that judgment might possibly coincide with the amount which could have been rendered under an implied contract. It was certainly "the substantial right" of the defendant below to have the trial court consider and determine separately the only claim which plaintiff was entitled under the law to submit to the court, viz.: the claim made under *quantum meruit*, and when the trial below consisted only of the determination of the claim under the express contract (which all the judges of this court agree could not be considered), it can not be said that "substantial justice has been done" to defendant.

The record shows that the plaintiff has rendered services to the decedent for which she should receive liberal compensation, and it would be unfortunate that the settlement of the estate should be unnecessarily delayed by the sending back of this case for retrial. But where the amount plaintiff may be entitled to receive as the value of the services rendered by her has, as I believe, not been considered or determined by the court below, it is, in my opinion, not the province of this court on error to take up that question and determine it from the record as though this were a trial court; nor is it correct for this court to now modify the judgment of the court below by fixing it at the amount claimed in the petition reduced only by the payments which have been admittedly received by plaintiff on account of her services.

**LIABILITY OF MASTER FOR COMBINED NEGLIGENCE OF  
FOREMAN AND FELLOW-SERVANTS.**

Circuit Court of Cuyahoga County.

**THE CLEVELAND CITY FORGE & IRON COMPANY V. WILLIAM  
C. WELCH.\***

Decided, December 4, 1911.

*Master and Servant—Negligence—Proximate Cause—Combined Negligence of Foreman and Fellow-Servants.*

In an action by a workman against his employer for damages from personal injuries there may be a recovery, if the workman was without fault and his injury was proximately caused by the combined negligence of a foreman and fellow-servants. In such case it is merely necessary to show that one of the co-operating causes of the injury was a culpable act or omission for which the master would be responsible, and the rule holds good, whether the other causes were also defaults for which the master would be responsible, or were due to some event or condition for which he is not required to answer.

*Russell & Eichelberger, for plaintiff in error.*

*Harry F. Payer, contra.*

MARVIN, J.; WINCH, J., concurs; HENRY, J., dissents.

This was an action for damages for personal injuries with verdict and judgment for the plaintiff below.

Objection is made to the language of the charge, as found on page 282 of the record, in which the court said:

"He could not recover, as I have already indicated, by reason of negligence on the part of his fellow-servants, but I say to you, gentlemen, that if plaintiff's injury were proximately caused by the combined negligence of his fellow-servants, co-operating with the negligence of the foreman, under such circumstances there could be recovery, if the plaintiff were himself free from negligence causing or proximately contributing to his injury. Of course, this is all conditioned upon the question whether

\*Affirmed by the Supreme Court, *Cleveland City Forge & Iron Co. v. Welch*, 87 Ohio State, 512.

the plaintiff was negligent, and if his negligence caused or contributed to his injury, as I have already indicated, the existence of such negligence on the part of the plaintiff—contributory negligence—would operate to defeat a recovery.”

In another part of the charge, the court substantially repeated this proposition.

The proposition stated in the charge, as an abstract proposition of law, is supported by too great weight of authority to be questioned here (*Railway Co. v. Henderson*, 37 Ohio State, 549, second clause of the syllabus, and the numerous authorities there cited on page 553; see also *L. S. & M. S. Ry. Co. v. Litz*, 18 C. C., 653; also *L. S. & M. S. Ry. Co. v. Feller, Admr.*, 21 C. C., 605; and *Railway Co. v. Hudson*, 22 C. C., 586). But it is urged that under the facts of the present case, the charge was calculated to, and probably did, mislead the jury.

This question is discussed at considerable length in *Labatt on Master and Servant*, in a number of sections. Beginning with Section 806, the author discusses the question as to the liability of a master for some negligent acts where causes intervene between the original negligent act of the master, and the actual injury to the servant; and in Section 808, he speaks of such intervening acts of responsible actors, as are not of themselves culpable, and he concludes the section with these words:

“Considering that the ultimate test of liability is whether the consequences flowing from the negligence charged were such as might reasonably have been expected, the decisions under this head can not easily be reconciled upon the facts.”

In the notes under this section, numerous cases are cited, where liability was denied, as well as cases where it was affirmed. Among the latter: *Knapp v. Sioux City & P. R. Co.*, 71 Ia., 41 (32 N. W., 18); *Finley v. Richmond & D. R. Co.*, 59 Federal, 419; *Chicago G. W. R. Co. v. Price*, 97 Federal, 423.

Many other cases are cited and quoted from in the notes under this section.

Section 809 of *Labatt* is headed: “Culpable acts of responsible actors; negligence of co-servants.”

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In this section, too, the author points out the difficulty of fixing a boundary between the state of facts which would hold the master liable, where the intervening culpable acts are those of a fellow-servant, and where the master would be excused because of the negligence of the fellow-servant proximately causing the injury.

Section 813, of this same work, is in these words:

"Where several causes concur to produce certain results any of them many be termed 'proximate' provided it appears to have been an efficient cause."

The general rule applicable to all cases illustrating this situation, except those in which the contributory negligence of the servant himself is involved, is that in order to establish the right of action, it is merely necessary to show that one of the co-operating causes of the injury was a culpable act or omission for which the master was responsible. This rule holds good, whether the other causes were also defaults for which the master was responsible, or were due to some event or some condition for which he was not required to answer.

In the case at bar, under the charge of the court, no recovery could have been had unless the jury found that the foreman of the defendant company, Newey, was negligent in giving the order for the moving of the wrench. It was clearly pointed out to the jury in the charge that unless the foreman, in giving this order, might expect as a natural consequence that an injury would result to the plaintiff below, or somebody else, then the defendant would not be liable. Under the instructions of the court, the jury must have found, and we are not prepared to say that they were not justified in finding, that the natural result of an order given in the terms that the order was here given would be that the men to whom it was given would immediately and hurriedly move the crank, as they did move it, and that knowing as he did the position in which the plaintiff was at the time, he should have anticipated, if he had given it the thought that it was his duty to give before he caused the crank to be moved, that injury would result to the plaintiff.

It can hardly be doubted that if the foreman had himself moved the crank, as it was moved, and the plaintiff was without fault, the plaintiff could recover. But it is urged that the action of the two men who moved the crank was an intervening cause between the order of the foreman and the plaintiff's injury. True, the actions of the men who moved the crank did intervene. That intervention on their part was either negligent or without negligence. If it were negligent, the jury, as we think, might well find that the foreman should have anticipated such negligence on the part of those who moved the crank, if the word "negligence" is used in the sense of failing to exercise such care as they should and would under ordinary circumstances have exercised, and the authorities, to which attention has already been called, would, if the jury so found, justify the charge in this regard and justify the result reached by the jury.

If the action of the men who moved the crank was not negligent, then, under the authorities quoted, if their acts were the natural result of the order given, and the plaintiff was without fault, he would be entitled to recover.

The fact that there was a cause intervening between the negligent act of the foreman and the injury to the plaintiff, would not necessarily prevent a recovery.

If the result to the plaintiff was what might naturally and probably follow as a consequence of the negligence of the foreman, the foreman must be held to have anticipated what did result, provided, of course, the plaintiff was without fault. This seems to us to be fully justified by the holding of our Supreme Court in the case of *Adams v. Young*, 44 Ohio State, 80, and *Railway Co. v. Snyder*, 55 Ohio State, 342.

The second paragraph of the syllabus in the first of these cases reads:

"In an action against a mill owner for damages to property caused by fire negligently or carelessly thrown by sparks from the smoke stack of the mill and carried to the property by a gale of wind blowing at the time in the direction of the property, by which fire the same was damaged; where the conditions continue the same as when the negligent and careless act was done, and no new cause intervenes, it is no defense that the fire first

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burned an intervening building and was thence communicated by sparks and cinders in the same manner to the building in which such fire consumed the property, though the buildings were separated by a space of two hundred feet."

The second paragraph of the syllabus in the last of these cases reads as follows:

"The company delivering the car to the other company, should anticipate that employes of the latter would go upon and handle the car and thereby be exposed to the danger of receiving injury as a natural and probable consequence of its defective condition, and owes such employes the duty of using reasonable care to discover and remove its dangerous defects before it is so delivered. The services of such employes being necessary to accomplish the transportation intended, the delivery of the car for that purpose amounts to an invitation to them to go upon and handle the car in the course of their employment, and an assurance that they could safely do so."

Can it be said that this is inconsistent with the charge of the court given at the request of the defendant and numbered 2, which reads:

"The defendant's foreman, William Newey, in giving the order complained of by plaintiff's witnesses, assuming such order was given, could not be held to have presumed that Janosko and Verbofsky would act negligently, but on the other hand, he had a right to presume that they would act with such care as their experience and familiarity would warrant."

This request given was too favorable to the defendant, if it is inconsistent with the general charge, and surely if it was too favorable for the defendant, it can not be heard here to complain of it.

The other propositions given, taken in connection with the general charge, we think, presented the case to the jury as favorably as the defendant was entitled to. They read:

"The defendant could not be found liable in this case unless you find that the defendant's foreman, William Newey, was negligent in giving the order testified to by plaintiff's witnesses, and that such order was the proximate cause of plaintiff's injury, and by proximate cause is meant a cause from which a man of

ordinary experience and sagacity could foresee what result would likely follow; that the accident to plaintiff was of such a character as might reasonably have been foreseen as a natural and ordinary result of the order complained of.

“There could be no recovery in this case unless you should find that the defendant’s foreman acted negligently in giving the order testified to by plaintiff’s witnesses, and not then unless such order was the direct and proximate cause of plaintiff’s injury, or produced results which a man of ordinary care and prudence could anticipate as the result of the order complained of.”

On the whole, we think this case was presented to the jury in as favorable a light as the defendant was entitled to have it presented; that it has no just cause of complaint of such charge. We think, too, that the jury were fully justified in finding that the order given by Newey in the manner in which it was given, as shown by the testimony, was a negligent order. It is said that the two men to whom the order was given were experienced workmen, and that Newey had a right to understand that they would be careful not to expose the plaintiff or any one else to danger in the execution of the order.

Though the witnesses who testified as to the giving of this order do not all give it in the same words, the plaintiff’s witnesses unite in saying that it was given in an earnest, forceful manner, and was accompanied by profanity, indicating that the foreman was thoroughly impatient and meant to have something done and done at once by these men; that, in short, he was ugly about it; that he did not speak to them as a careful foreman ought to address intelligent men; that it was given in such tone and manner, and accompanied by such profanity, as indicated that any delay in its execution would result, at least, in severe censure on the part of the foreman.

The plaintiff in error complains generally that the charge was not sufficiently definite in that it failed to explain to the jury what constituted negligence and the want of it. An examination of the charge seems to us to answer this, and to answer it against the plaintiff in error. The charge, including those propositions which were given at the request of the defendant, certainly, as

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has already been said, submitted the case to the jury in as favorable a light as the defendant was entitled to.

Questions raised as to the rulings on evidence have been examined, and we find no erroneous rulings to the prejudice of the plaintiff in error in said rulings, nor in any part of the record which would justify a reversal, and the judgment is affirmed.

**SUBSCRIBER FOR PREFERRED STOCK, RECEIVING COMMON STOCK FREE, HELD LIABLE.**

Circuit Court of Cuyahoga County.

H. O. YODER v. ALEXANDER TUBMAN.

Decided, December 4, 1911.

*Corporations—Preferred Stock—Collection of Subscriptions to—Limitations of Action Upon—Purchaser of Such Claims from Trustee in Bankruptcy.*

1. An action may be brought for the collection of a subscription to the preferred stock of a corporation upon its insolvency, when it appears that the debts of the corporation exceed its assets and the full amount of unpaid subscriptions to all of the common as well as to all of the preferred stock without waiting until all remedy against subscribers to common stock has been exhausted.
2. The limitation of eighteen months expressed in Section 8688, General Code, within which an action upon the liability of stockholders must be brought, does not apply to an action to collect an unpaid subscription to stock.
3. A trustee in bankruptcy of an insolvent corporation may, under proper order, sell claims for unpaid subscriptions to capital stock of the corporation and the purchasers of such claims from the trustee may maintain an action thereon against such subscribers, but whether he can recover from them more than he paid for the claims, *quaere*.

H. O. Yoder, for plaintiff in error.

Dissette, Dissette & Dissette, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error to the court of common pleas.

This was an action upon a subscription for preferred stock in a corporation, common stock being also promised the subscriber free.

To this amended petition a demurrer was filed and sustained and thereupon, the plaintiff not desiring to plead further, the court entered judgment for the defendant.

On behalf of the defendant in error it is urged, first, that the written agreement sued upon was illegal, because of the language at the close of the writing in these words: "Twelve shares common, free." It is said that this language shows that the corporation was making a promise to this subscriber which it had no authority of law to make.

Conceding this to be true, was there any less an obligation on the part of the promiser to pay the agreed price for that which the corporation had a right to issue to him? We think not. The promiser may as well be supposed to know as the promisee that he would have no right under this contract to receive any stock except that for which he paid.

It is further urged that the plaintiff's petition fails to state that the remedy against the common stockholders has been exhausted, or by what right he seeks to hold a subscriber of preferred stock.

A reading of the petition shows that all the assets of the corporation had been converted into money and applied to the payment of debts of the corporation, and that the corporation still owed debts largely in excess of all which remained unpaid upon subscriptions for capital stock, so that, if the allegations of the petition are true in this regard, there would be no reason why a proper party might not bring a suit against each of the subscribers for stock, whether such subscription were for common or preferred stock, since when all was collected, there would still be less than enough to pay the debts.

The language of the statute, General Code, 8670, reads:

"Upon the insolvency of the corporation no holder of preferred stock shall be liable for its debts until after the remedy against the common stockholders upon their liability, as provided by law, has been exhausted, and then only for such amount as re-

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mains unpaid. Such liability in no event shall exceed that fixed by law for the common stock of such corporation."

But it can not be supposed that an action against preferred stockholders is premature when the facts are that by exercising the claims on subscriptions for common stock, there would be so great a deficiency as that all of the unpaid subscriptions for preferred stock added to it would still be insufficient to pay. To construe the statute in this wise might delay the collection of subscriptions for preferred stock, when it is certain that all will have to be collected in order that the creditors be paid, until each subscriber for common stock fought his case through, if he chose to, to the Supreme Court of the state. This would result in great delay and to no good purpose. If the subscribers to the preferred stock could be released entirely from the payment for their stock, or could be relieved from the payment of some part of their subscription, by exercising all the remedies against the subscribers for common stock, the statute would apply; but that is not the case here. When all the subscribers for the common stock have paid, if the allegations of this petition are true, the subscribers for preferred stock would still be liable for their entire subscription. This objection is not well taken.

It is again urged that by reason of the language of Section 8688 of the General Code, the plaintiff is barred from bringing this action, because it was brought more than eighteen months after the obligation, if there were any, became enforceable. This section reads:

"An action upon the liability of stockholders under the two next preceding sections, can only be brought within eighteen months after the date the obligation shall become enforceable against stockholders."

Referring to the preceding sections named, we find that they have reference to the liability of stockholders as it was prior to the 23d day of November, 1903. Up to that time, each stockholder was liable for the payment of the debts of the corporation to an amount equal to his capital stock, and it is that liability for which, under Section 8688, the suit must be brought within eighteen months. This objection is not well taken.

This brings us to a consideration of the question of whether the trustee in bankruptcy could assign, under an order of the court, to the plaintiff in this section the right to bring this suit. If what we have already said is correct, we have only the question of whether the right to bring such a suit is limited to the trustee alone, or whether he may sell it to another. Generally the assets of the corporation, of which the obligation of the subscriber for stock is one, may be sold by the trustee. We know of no prohibition against this right being sold by the trustee when the court shall so order, and when the trustee receives pay for such chose in action, and uses the money so received by him toward the discharge of the debts of the corporation.

We do not undertake to say whether the plaintiff here would be entitled to recover the full amount of the subscription, or only what he paid for it, what the creditors received, but we do hold that he was entitled to recover something if the allegations of his petition are true; and so we think the court erred in sustaining the demurrer and entering judgment for the defendant, and that the plaintiff failed to receive substantial justice.

The judgment of the court of common pleas is therefore reversed and the case remanded.

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**CONTEMPT PROCEEDINGS AGAINST PUBLIC OFFICERS.**

Circuit Court for Coshocton County.

STATE OF OHIO, ON RELATION OF JOHN R. MAPLE, v. GAIL S.  
HAMILTON, MAYOR OF COSHOCTON.\*

Decided, July, 1912.

*Suspended Official Restored by Order of Court—Attempt to Recover  
Salary During Period of Suspension—By Contempt Proceedings  
Against Municipal Treasurer and Other Officials.*

1. The relator was removed from his office of chief of police by the mayor of the city. In a mandamus proceeding brought for that purpose by the relator, the mayor was ordered to restore him to his office of chief of police in the city with all the privileges, prerogatives and emoluments thereunto belonging, which order was finally affirmed by the Supreme Court. The mayor restored the relator to his office of chief of police. Subsequently the relator, not having been paid his salary and fees during the period covered by his suspension, filed a motion in the circuit court asking for a rule against the mayor, director of public safety, city auditor, and treasurer of such city, requiring them and each of them to show cause why they should not be attached for contempt for not paying the relator his salary and fees during such period of suspension. *Held:* That the director of public safety, city auditor and city treasurer, not having been parties to the original action and proceeding in which the order was made, can not be attached for contempt in disobeying an order made therein, and that the mayor, having restored the relator to his office, had performed all the duty devolving upon him.
2. In a subsequent hearing, it appearing that on the application of the relator, three members of the bar were named by the court to prosecute such contempt proceeding against the above named city officials, and the question was presented as to whether or not the three attorneys named should be allowed and recover as costs in the case fees either against the defendant or the city. *Held:* That the case is not one in which attorney fees as costs can be allowed.

\*Affirmed without opinion under the title of *State, ex rel, v. Cassingham, Mayor* (June 24, 1913); judgment as to costs set aside and vacated, and costs in the Supreme and Circuit Courts taxed against the State (December 16, 1913). 88 Ohio State.

*Bert F. Voorhees*, for relator.

*John J. Adams*, City Solicitor, contra.

NORRIS, J. (sitting in place of VOORHEES, J.) : SHIELDS, J., and POWELL, J., concur.

On the 31st day of July, 1909, the mayor of Coshocton issued an order removing John R. Maple, the relator, from his office of chief of police of the city of Coshocton, and appointed another in his place.

The relator, on the 7th day of August, 1909, filed a petition in the court of common pleas, asking for an order that he be restored to said office of chief of police with all the privileges, prerogatives and emoluments thereunto belonging. The court of common pleas ordered the relator restored to said office, and on appeal the same judgment was rendered in the circuit court, and the judgment of the circuit was affirmed by the Supreme Court, and the case remanded to the circuit court for execution.

After the decision of the Supreme Court, to-wit, on January 1st, 1912, the mayor of Coshocton restored the relator to his office and he has since that time been holding the office and acting as chief of police. Since January 1st the relator has been tendered his salary as such chief of police, but has not been paid or tendered his salary as such chief of police during the period from August 1st, 1909, to January 1st, 1912.

On May 21st, 1912, the relator filed a motion in this court asking for an order against George W. Cassingham, mayor, R. F. Timmons, director of public safety, Evan O. Evans, city auditor, and Harold Hershman, treasurer of the city of Coshocton, requiring them and each of them, to show cause why they should not be attached for contempt for disobeying the peremptory writ of mandamus issued in this case by this court in the following particulars as specified:

"1st. For not complying with the order of the court contained in the alias peremptory writ of mandamus heretofore issued in this case May 21st, 1912.

"2d. For not restoring to the said John R. Maple as chief of police of the city of Coshocton, Ohio, all the privileges, prerogatives and emoluments incident thereunto belonging, and all

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property and rights of which he was deprived and disposed of by reason of the order and wrongful acts aforesaid, as they were commanded to do, by the alias peremptory writ of mandamus issued herein May 21st, 1912.

"Said emoluments and prerogatives incident to the office of the chief of police of the city of Coshocton, Ohio, consists of his salary of \$840 per year payable semi-monthly, from August 1st, 1909, to May 15th, 1912, amounting to \$2,345, and fees of the chief of police of the city of Coshocton, Ohio, in state cases prosecuted and convictions had before the mayor of the city of Coshocton, Ohio, from August 1st, 1909, to May 23d, 1912, the amount of which fees is unknown to relator, not having access to the records of the said mayor of the city of Coshocton, Ohio, but the amount is claimed and alleged as a fact to be \$750."

It is further stated that the relator has been tendered a warrant for his salary as chief of police from the 1st day of January, 1912, to date, which was refused by the relator. An affidavit of the relator was filed in support of the motion stating, among other things, that he gave each of the defendants on the 21st day of May, 1912, written notice of the issuance of the writ of mandamus on May 21st, 1912.

Cassingham, the mayor, answered that he has fully restored the relator to his office and he has since been discharging the duties thereof, and he further answers with reference to the first claim by the relator, which is not necessary now to consider.

The director of public safety answers, stating that he was never a party to any action in the circuit court or any other court, in which a writ of mandamus was issued directing him to do anything with reference to restoring John R. Maple to his office or the emoluments thereof, and further that it is no part of his duty to restore the chief of police, and further answered that another, during the interim, was acting as chief of police and was paid the salary, etc.

The city auditor makes substantially the same answer, so far as it is necessary to consider the same.

The city treasurer moves to dismiss the proceedings because the same do not specify any facts showing any disobedience or resistance of an order of the court, and further does not show that he has refused to pay any warrant issued in behalf of the

relator, and that he has no right to pay the salary of the chief of police except on warrant.

Considerable testimony was offered on both sides in the case, much of which it is not necessary now to consider. The director of public safety, the city auditor and city treasurer were not parties to the proceeding and were never made parties thereto except by the filing of the motion and affidavit charging them with contempt of court in not obeying the mandate and decree of the court.

The relator's claim is that they did not, each in his particular office, perform the necessary acts to pay the relator his salary as chief of police while this action was pending in the courts, and while another was acting in his stead, and also pay him certain fees which he claims he was entitled to.

A legal question is raised by the answers which we do not consider it necessary for us now to pass upon, as it is not properly before us, and that is whether or not the relator is entitled to a salary during the time he was unlawfully kept from his office and another was acting in his stead and was paid the salary. We do not think this question was settled by any judgment rendered in this case up to this time.

This court is asked to punish certain officers of the city for contempt in disobeying its order, but the order was only directed to the mayor, ordering him to restore the relator to his office with the emoluments, etc. The mayor has done all that he can do in carrying out that order. He has restored the relator to his office. He has nothing to do with paying him his salary or his fees. The proceeding was brought only against the mayor. No other officer was named. No other officer was served with any order in this case. The only notice of any kind that the other defendants had in this case is a notice of the order which relator claims he served on the 21st of May, 1912.

What was the order? To restore the relator to his office with emoluments, prerogatives and perquisites. The director, auditor and treasurer, had nothing to do with restoring him to his office. What were the emoluments, etc., to which relator is entitled? Relator does not even himself know to what fee he makes claim,

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and it would seem from the authorities cited that the law is not entirely clear under the facts in this case as to what salary the relator is entitled. The city solicitor contends, and doubtless advised the other officers, that relator was not entitled to the salary during the time he was not performing the duties of his office.

Were those officers of the city to decide this question at their own peril, and if they decided against the relator and were wrong, to be punished therefor, as being in contempt of the court?

We think first that the order was too indefinite, as held:

"In order that a commitment may issue under any circumstances, as already stated, the precise thing to be done by the party proceeded against, must be stated in the judgment or order." *Cross v. Butler*, 10 N. Y. Sup., 444 (57 Hun., 110); *Pritett v. Pressley*, 62 Ind., 491.

Again, the order was never served upon the director, auditor and treasurer. It is claimed they were given notice of such order.

"Before a party can be brought into contempt for not complying with an order of court, such order must be served on him." *Hennessy v. Nicol*, 105 Cal., 138 (38 Pac., 649); *Perrine v. Broadway Bank*, 53 N. J. E., 211 (33 A. P. L., 404); *Teho v. Baker*, 77 N. Y., 33; *Ex parte Willand*, 73 E. C. L., 544.

But can these officers be punished for not obeying an order issued in a case to which they were not parties? Each of these parties had the right to litigate the question as to relator's salary and fees. This is not an action brought against the city which might bind the officers of such municipal corporation. It was merely an action against the mayor of the city and the order was directed to him. None of the other parties sought to be punished have had any day in court except to answer this charge made against them in this court.

We think the case of the *Second National Bank of Sandusky v. Becker*, 62 O. S., 289, decisive of this question, if authority we need. Quoting from the concluding portion of the opinion in that case:

"As has already been noted, they were not parties to the original action against Becker, nor before the court, either by process or appearance, when the order was entered in that action requiring them to redeliver the attached property to the sheriff or pay the judgment then rendered in favor of the bank against Becker. The court was therefor without jurisdiction to make the order that was then entered against them. That order was the foundation of the subsequent proceeding for contempt. In that proceeding they were only notified to show cause why they had not redelivered the property in compliance with the previous order. No suit was brought against them on the undertaking, nor opportunity given them to plead or make defense to any claim of liability thereon, or be heard according to the usual course of legal proceedings. It can scarcely be claimed that this was due process of law."

What is the foundation of this proceeding for contempt? It is an order issued to the mayor only. The other parties have never had an opportunity to be heard as to any defense they might have against the claim made by relator. We do not think that to now hold them guilty of contempt would be due process of law. The mayor, having complied with the order so far as he is able, is not guilty of contempt. The motion of the relator must therefore be denied and the rule discharged.

The case was further heard on the application of relator for an allowance of attorneys' fees as costs in the case. Upon the application of relator three members of the bar were named by the court to prosecute the proceedings for contempt.

The question arises as to whether or not the three attorneys appointed should recover, as costs in the case, attorneys fees either against the defendants or the city of Coshocton. The city of Coshocton was never a party to any of the proceedings. It is claimed that inasmuch as this is a case in which the authority and dignity of the court itself was involved, that attorneys fees may be collected of the city notwithstanding the judgment in this case.

We think some confusion has arisen with reference to contempt proceedings. There are two classes of what are denominated acts of contempt. They are defined in the *Cyclopedia of Law and Procedure*, Vol. 9, page 5, as follows:

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"A criminal contempt is conduct that is directed against the dignity and authority of the court."

This is the contempt provided for in Section 12136 of the code and was the contempt charge in the case of *Myers v. State*, 46 Ohio St., 473, cited by counsel. In that case the court especially appointed counsel to prosecute the case to protect its own dignity and authority in the administration of justice.

"Civil contempt exists in failing to do something ordered to be done by the court in a civil action for the benefit of the opposing party therein."

That is provided for in Section 12137 of the code, where it says: "Certain acts may be punished as for the contempt."

That is the statute invoked in *State v. Crites*, 48 Ohio St., 460. The case at bar comes under that statute and is of that class of cases. The complaint is that the defendants failed to do something for the benefit of the relator, i. e., failed to pay any salary and fee. Again, in 9 Cyc., 35:

"Proceedings for contempt to enforce a civil remedy and to protect the rights of parties litigant should be instituted by the aggrieved parties, or those who succeed to their rights, or some one who has a pecuniary interest in the right to be prosecuted. If, however, the proceeding is to vindicate the authority of the court and is criminal in its nature, the state is the real prosecutor."

The learned editor cites numerous authorities in support of the above quoted text. Among others, *Lester v. People*, 150 Ill., 408; *Secor v. Singleton*, 35 Fed., 376; *Latimer v. Barmore*, 81 Mich., 592.

In *People v. Compton*, 1 Duer., 512, it is stated that a solid and obvious distinction exists between contempt cases strictly and those acts denominated contempts, which are punished as such only for the purpose of enforcing a civil remedy. To the same effect is *Secor v. Singleton*:

"It would seem to follow that an injunction obtained to protect merely a private right is so far within the control of the party obtaining it, and is so far a matter of individual concern, that only those persons who have a present interest in the right to be protected can be heard to complain of its violation."

We can find no authority authorizing the recovery of attorneys fees in this kind of a case. The policy of this state has been generally against the recovery of attorneys fees as a part of the judgment or costs. In *Cole v. R. R. Co.*, 10 Ohio St., 372, pages 409-410, the court says:

“However desirable and just it may appear in particular cases to charge upon the defendant or his property, fees of counsel representing the plaintiff, such is not the policy of this state. Even the small docket fees which were allowed were abolished by the Legislature. We know of no rule or principle which will entitle us to deviate from the policy in this case.” See *Cole v. Rosser*, 53 Ohio St., 12; 50 Ohio St., 591.

What is “right and equitable” in a mandamus case? In Section 12298 it is provided that a mandamus case where a judgment for defendant, all costs shall be allowed against the relator as above found. This is a proceeding in the original case which was a mandamus case. The defendants were required to show cause in that case why they should not be punished as for contempt. The court has found that they were not guilty and has ordered them discharged. It seems to us that the conclusion is irresistible that the relator should pay the costs, and it is so ordered.

The late case of *Brundige v. Village of Ashley*, 62 Ohio St., 526, is a much stronger case for the allowance of attorneys fees than this, yet such allowance was denied by the Supreme Court. The only cases in which attorneys fees can be asked as costs in this state are in partition cases as provided by statute and in certain trust cases where all parties have a common interest in the trust fund. These cases are well stated in the case of *Hopple v. Hopple*, 4 N.P. (N.S.), 255, of which the case of *Cole v. Tucker*, 35 Ohio St., 581, and *Mason v. Alexander*, 44 Ohio St., 337, are examples. How can the costs, including attorneys fees, be charged against the city in this case anyway? It never was a party to either of the proceedings.

The statute on the subject found in the following sections of the code: 11624, costs allowed to plaintiff when he recovers the money, judgment or specific real or personal property; 11626,

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in certain cases costs are allowed to the defendant; 11628 provides that in other cases costs may be allowed in such manner as "right and equitable."

### EFFECT OF TAKING A SEVERAL JUDGMENT BY DEFAULT.

Circuit Court of Cuyahoga County.

A. T. OSBORN AND F. L. FELCH V. THE AMHERST BANK  
COMPANY.

Decided, December 4, 1911.

*Promissory Note—Joint and Several Endorsers—Joint Maker—Several Judgment.*

A several judgment may be had against one who is a joint and several endorser but only a joint maker of a promissory note, leaving the action to proceed against the other makers of the note.

*George A. Groot*, for plaintiff in error.

*Myers & Green*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error of the court of common pleas.

A petition was filed by the Amherst Bank Company against S. W. Parsons and W. S. Snyder, doing business as Parsons, Snyder & Company, F. Carpenter, A. T. Osborn and F. L. Feleh. The cause was upon a promissory note, which reads:

"\$2000.00. CLEVELAND, OHIO, Jan. 27, 1908.

"Three months after date, the undersigned promise to pay to the order of Parsons, Snyder & Company of Cleveland, Ohio, the sum of Two Thousand no-100 Dollars at the office of said firm with interest at the rate of 6%.

"The undersigned have deposited with said Parsons, Snyder & Company, as collateral security for the payment of this obligation the following property, viz., twenty-five thousand shares of the capital stock of the Cross Lake Syndicate; and hereby agree that upon default in the payment of this note said Parsons, Snyder & Company shall have full power and authority to sell, assign and deliver the whole of said securities or any part

thereof, without either advertisement or notice, the same being expressly waived.

(Signed.) "S. W. PARSONS.  
"F. CARPENTER.  
"A. T. OSBORN.  
"F. L. FELCH."

"Endorsements.

"Interest paid to April 27, 1908.

"Pay to the Amherst Bank Company.

"PARSONS, SNYDER & COMPANY."

The allegation is further made in the petition that payment of said note was duly demanded of said S. W. Parsons, F. Carpenter, A. T. Osborn and F. L. Felch at maturity, but the same was not paid, of all of which the said S. W. Parsons and W. S. Snyder, doing business as Parsons, Snyder & Company, had due notice.

The transcript shows that summons in the action was served upon F. L. Felch, A. T. Osborn, W. S. Snyder and S. W. Parsons; that no service was made upon the defendant F. Carpenter, he not being found in the county by the sheriff.

This suit was begun on the 27th of March, 1909. After service upon the parties already named as having been served with summons, and at a time thereafter beyond the time for filing answers by the defendants, to-wit, on the 26th day of April, 1909, the entry is:

"To Court: The plaintiff comes, but the defendant S. W. Parsons is in default of answer or demurrer, although duly served with process, and the allegations of the petition are thereby confessed by him to be true; on consideration thereof the court finds that there is due to the plaintiff from the defendant, S. W. Parsons, as damages, the sum of two thousand one hundred and twelve dollars (\$2,112). It is therefore considered that said plaintiff recover of said defendant, S. W. Parsons, its said damages and also its costs of this suit."

Answers were filed by the other defendants, and thereafter the case was tried as against the other defendants who had been served with process, and at the conclusion of the evidence, the court directed the jury to find for the plaintiff, and assess its damages by reason of the premises at \$2,351.70, against the d-

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defendants A. T. Osborn and F. L. Felch, to which direction of the court the said A. T. Osborn and F. L. Felch except.

It is to reverse this judgment of the court of common pleas that this proceeding is brought, the contention being that the plaintiff having taken judgment against Parsons on default, the case as against the other defendants could not be maintained; and attention is called to Section 11584 of the General Code, which reads:

“In an action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.”

It is said that this note, reading as it does, was a joint note, and that therefore a several judgment could not have been rendered against one of them without relieving all; that the plaintiff having elected to take the several judgments against Parsons was thereby estopped from proceeding with the case against the other defendants.

A discussion was had at the hearing of this case as to whether the note sued upon was a joint note or a several note as against each of the makers. The language of the note, it will be observed, is peculiar. It is neither “We promise to pay,” nor “We and each of us promise to pay,” nor “We or either of us promise to pay”; but only, “The undersigned promise to pay.”

We do not deem it necessary, in determining this case, to decide the question of whether this note is one such as that a several judgment could have been rendered against any one of these parties as makers. It was shown that the defendants S. W. Parsons and W. S. Snyder were partners at the time this note was given, under the partnership name of Parsons, Snyder & Company; so that this indorsement by Parsons, Snyder & Company was an indorsement both by Parsons and by Snyder.

Section 8173 of the General Code provides:

“As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsers who indorse are deemed to indorse jointly and severally.”

This being so, the case as against Parsons as indorser certainly authorized a several judgment against him, and it is unnecessary to determine whether as maker a several judgment could have been rendered against him. Since a several judgment could have been rendered against him as an indorser, the rendering of such several judgment against him did not take away from the plaintiff the right to proceed against the other defendants as though this several judgment had not been taken.

We reach the conclusion, therefore, that the judgment of the court below should be affirmed, which is accordingly done.

### **PROTECTION TO CITY IN PAYING ALIMONY TO WIFE OF A POLICEMAN.**

Circuit Court of Cuyahoga County.

**FREDERICK J. LAMBERT V. THE CITY OF CLEVELAND.**

Decided, December 4, 1911.

*Alimony—Divorce—Erroneous Order Refusing to Modify Alimony After Divorce—Protection to Party Owing Husband Who is Ordered to pay Wife.*

A wife brought an action in Cuyahoga county against her husband, who was a police pensioner of the city of Cleveland, for alimony and was allowed alimony in the sum of \$25 per month which was ordered paid to her by the city, which was a party to the case, out of the husband's pension. Subsequently the husband brought an action for divorce in another county against his wife and was awarded it on her aggression. Thereafter he filed a motion in the Cuyahoga county court for modification of its alimony order, setting up the divorce decree as a reason why he should pay no more alimony; this motion was overruled and with knowledge of the divorce, the city continued to pay the wife as previously ordered. Thereafter the Cuyahoga county court granted another motion to modify the alimony order and stopped payments of alimony to the wife. In an action by the husband against the city to recover the money paid by it to the wife after it knew of his divorce from her; *Held:* The order in the alimony case was full protection to it notwithstanding the order refusing to modify the alimony awarded after divorce, was erroneous.

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*Wing, Myler & Turney*, for plaintiff in error.

*Newton D. Baker*, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

Lambert sued the city of Cleveland to recover half of his police pension which the city, under an order of court, had paid to his former wife instead of to him. He failed in his action, and now seeks a review of the judgment against him.

It seems that in 1897, Eliza Lambert, who was then the wife of plaintiff, brought an action for alimony against him in the Court of Common Pleas of Cuyahoga County, making the city a party defendant thereto, and representing that her husband was entitled to a payment of \$50 per month from the police pension fund of the city. Such proceedings were had in the case that the wife was allowed alimony in the sum of \$25 per month, and an order was made against the defendant city directing it to pay said amount monthly to the wife. With this order it complied.

Subsequently the husband moved to Geauga county and there sued his wife for divorce. Such proceedings were there had that in 1902 he was granted a divorce from his wife on her aggression, without allowance of alimony.

Immediately upon the granting of the divorce, he did file a motion in his wife's alimony case in Cuyahoga county, asking for modification thereof on the ground that the divorce had relieved him from further obligation to support her. This motion was overruled, and his attorney, Judge Penewell, notified the city of that fact and authorized it to continue its monthly payments of \$25 to the divorced wife, which it continued to make to her.

In July, 1909, plaintiff filed his second motion in the alimony case in Cuyahoga county, for a modification of the order therein, and in October of that year, the common pleas court vacated its former order and directed the city to discontinue its payments to the former wife. This order, on error to the circuit court, was affirmed, whereupon the city ceased to make further payments to the wife.

Thereupon plaintiff brought this action against the city to recover from it payments made to the wife prior to the modification of the alimony decree in 1909. He claims that the judgment for alimony in Cuyahoga county became void upon the rendition of the divorce judgment in Geauga county; that the city had notice of the divorce and should, therefore, have ceased to make further payments to the wife, notwithstanding the court refused to grant the motion to modify the judgment.

We find no ground for this claim.

The refusal in 1902 to modify the alimony judgment may have been erroneous, but the judgment did not become automatically void, upon the rendition of the divorce.

Up to the date of the divorce the judgment for alimony was valid, for the court awarding it had jurisdiction of the parties and of the subject-matter.

Judgments are set aside only in the manner pointed out by law; and an alimony judgment may be set aside on motion addressed to the proper court; until the court acts, the original judgment is binding.

The city is protected in the payments it made to the former wife, by the order of the court requiring it to make said payments.

**Judgment affirmed.**

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**APPEAL FROM THE PROBATE COURT.**

Court of Appeals for Darke County.

**IDA F. MILLER V. JOHN W. MILLER, ADMINISTRATOR.**

Decided, May 1, 1914.

*Administrator—Appointment of, by the Probate Court—Not Subject to Vacation by Appeal, When—Sections 10605, 11206 and 10859*

An order by the probate court appointing as administrator of the estate of a decedent a person other than the one named in the will is not subject to review by appeal, where there is a finding by the probate court that the applicant for appointment designated in the will is not a suitable person to administer the estate.

*Martin B. Trainer, for plaintiff in error.**D. W. Bowman and John F. Maher, contra.***FERNEDING, J.; ALLREAD, J., and KUNKLE, J., concur.**

We have been favored in the consideration of this case by exhaustive briefs of counsel on both sides, which have been of valued service to the court in the conclusions arrived at.

The one question for solution presented seems to be whether or not an order of the probate court appointing one, not the party designated by the will, as the administrator of the estate, is subject to review by appeal.

Michael Miller of this county died, leaving a last will duly probated, item 4 of which provides: "I do hereby nominate and appoint my trusty daughter, Ida F. Miller, my executrix of this my last will and testament," etc. The probate court appointed her brother, John W. Miller, administrator with the will annexed of the estate of Michael Miller, deceased, a certified copy of the journal entry from the probate court pertaining to said appointment being as follows:

"This day this cause came on to be heard upon the application of Ida F. Miller, to be appointed executrix of the estate of said Michael Miller, deceased, upon the evidence and argument of counsel, and the court being fully advised in the premises do find that said applicant is not a suitable person to ad-

minister said estate, and do find that John W. Miller is a suitable person to act as such administrator, etc. Therefore the court do hereby appoint said John W. Miller administrator with the will annexed of the estate of Michael Miller, deceased.

"Thereupon came said administrator, etc., and filed herein his application for such appointment and also presented herein his bond as such administrator, etc., in the sum of \$32,000.00 with John Gilfillan, R. G. Howell, A. Z. Bruss and O. P. Wolversion as sureties thereon according to law. And this bond is approved by the court and ordered made a matter of record of this court, as required by law and letters are issued accordingly."

Section 10605, General Code, provides:

"The probate court shall issue letters testamentary thereon to the executor if any be named therein if he is legally competent."

Counsel for Ida F. Miller in his brief asserts that this provision of the statute is "mandatory," unless the executor named in the will is legally incompetent. We have no quarrel with this general view, but it is manifest from a consideration of the journal entry that the probate court, for reasons satisfactory to himself, and presumably upon the evidence found that Mrs. Miller was not legally competent. Whether this judgment of the probate court is well founded or not can only be determined by a reviewing court in a case properly brought before such reviewing court where the evidence can be reviewed.

Mrs. Miller sought to bring the case to the common pleas court by an appeal. The court of common pleas upon motion, dismissed the appeal. From this ruling and judgment of the court of common pleas the case is brought to this court for review on error. The only question, therefore, for our consideration is whether the court of common pleas was justified in dismissing the appeal.

Counsel for the appellant rely upon the clause in Section 11206, General Code, providing for appeals, from an order removing or refusing to remove an executor, administrator, guardian, assignee, trustee or other officer appointed by the probate court.

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The order of the probate court from which the appeal was attempted involves an original appointment, and not a removal or a refusal to remove. Counsel for appellant also relies upon Section 10859, General Code, which provides:

"From any order, judgment, or decree of the probate court, an appeal may be taken to the court of common pleas, by any person against whom it is made, or who is affected thereby, in the manner provided in other cases. Bills of exceptions may be taken and allowed upon any decision of the probate, common pleas or circuit court, in such proceedings as in other cases."

We think it has been sufficiently established that Section 10859, General Code, is limited to proceedings affecting orders of distribution and can not be made to apply to orders affecting original appointments of executors and administrators where the discretion of the original court is involved. Citing *Barr v. Klosterman*, 2 C. C., 390 (affirmed 27 Bull., 392); *Kislingberg v. Donovan*, 11 O. Dec., 542; *In re Kremer*, 8 N.P.(N.S.), 218, 219; *Ebersole v. Schiller*, 52 O. S., 702.

It is contended on behalf of the appellant that Section 11206, General Code, *supra*, should be liberally construed according to its spirit and reason, and to include cases of original appointment where the court declines to appoint the person or persons named in the will. Referring to the decisions upon this subject, we find that the courts have construed the statute in respect to appeals from the probate court to the common pleas court, strictly, rather than liberally. This policy is stated by Okey, J., in *Brigil v. Starbuck*, 34 O. S., 287:

"An examination of our legislation and decisions shows that it has been the general policy in this state not to permit an appeal from an order appointing or removing a trustee, and that this extends to guardians, executors and administrators. In some states the rule is different. 1 Green's Ch., 78; 1 McCarter, 540; 25 N. J. Eq., 508; 3 C. E. Green, 472; 1 Williams' Ex. (6 Sm. Ed.), 642. The exception as to an appeal from the appointment of a guardian for a lunatic or an idiot, made, doubtless, by reason of the gravity of the proceedings and its effect upon the persons, estate, and family of the ward, tends to prove the general rule in this state, and would seem to require that

those who assert other exceptions should be able to point out some provision in terms warranting the appeal."

In the case of *Browne v. Wallace*, 66 O. S., 57, it was held in an appeal under Section 11206, General Code, that:

"As the right of appeal exists only by virtue of the statutes, in order to give the appellate court jurisdiction, the statutory provisions must be strictly followed."

In the case of *Collins v. Millen*, 57 O. S., 298, Judge Bradbury, speaking for the court, says, at page 291:

"The right of appeal is statutory, and we must look to the statutes to ascertain if it has been lawfully exercised. The party who seeks to exercise this right, must comply with whatever terms the statutes of the state impose upon him as conditions to its enjoyment."

This policy of construction of statutes in regard to appeals was evidently in the mind of the General Assembly in the enactment of Section 11206, General Code, for it was expressly provided that appeals may be taken "in proceedings to appoint guardians or trustees for idiots, lunatics, imbeciles or drunkards."

Under the well known maxim, "*expressio unius est exclusio alterius*" the Legislature having expressly conferred the right of appeal in the cases specifically mentioned in the statute, there follows a reasonable inference that appeals were not to be allowed in other cases of original appointments. This construction is also in harmony with sound public policy. If appeals were to be allowed from cases of original appointments, it would often leave estates without any one in charge of the assets while the appointment was being litigated. The dictum of the Supreme Court in the case of *Bank v. Telegraph Co.*, 79 O. S., page 100, to the effect that, "The defendant if it had such an interest in the estate as would give it the legal standing to do so, might have attacked the appointment in the probate court, or by appeal or error," should be construed with the facts of that case.

It was not evidently intended to overrule the cases above cited nor to establish the right of an appeal direct from the

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original appointment. The court evidently had in mind an appeal from the final judgment upon an application to remove an administrator who had been improperly appointed. The case of *Schumacher v. McCallip*, 69 O. S., 500, did not involve an appeal from the probate court and is, therefore, not authority on this subject.

The opinion expressed by Judge Ferris, in 7 N. P., 665, is one of discretion for the probate court. In the case cited in this report the court appointed the party named in the will, and then later removed him. This may be a very proper course in ordinary cases, but we can not apply that rule in a reviewing court, unless the case is properly before such court with all the evidence bearing upon the propriety of such appointment. For aught we know, and we have nothing before us either in support of or adverse to the proposition, the probate court may have had good ground for the judgment rendered.

Whether proceedings in error in the common pleas court would be available is not involved in the present litigation and we, therefore, express no opinion in respect thereto.

The appeal was properly dismissed by the court of common pleas, and its judgment will, therefore, be affirmed by this court.

**ADMISSIBILITY OF STATEMENTS MADE BY AN ACCUSED  
PERSON IN A FOREIGN LANGUAGE.**

Circuit Court of Cuyahoga County.

IGNAZIO RIOLO V. STATE OF OHIO.

Decided, December 16, 1911.

*Criminal Law—Evidence—Conversation in Italian Given in English to  
Jury—Cross-Examination of Accused—Previous Admissions by  
Him.*

1. Statements made by the accused in Italian in answer to questions put to him in the same language by police officers, after his arrest, may be given to the jury in English by said officers, their ability to understand and translate Italian correctly being first inquired into and put before the jury.
2. The accused having given evidence in his own behalf may, on cross-examination, be questioned as to a different story by him told to police officers after his arrest.

*T. J. Ross* for plaintiff in error.

*J. A. Cline*, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

There was no error in the admission of the testimony of the two police officers as to statements made by the accused to them at the police station, after his arrest. Though they questioned him in Italian, and he answered in the same language, it was proper for them to repeat in English to the jury what had been said by and to them in Italian. It would have been idle to require them to first give to the jury the questions and answers in Italian and then translate the same themselves, or have an interpreter to translate it to the jury. Their ability to understand the language and translate it correctly was gone into and put before the jury, so that it was enabled to give this evidence the weight to which it was entitled.

Nor was there error in cross-examining the accused as to what the police officers had said to him and what he had said to them at the police station. The examination on this point was

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not for the purpose of eliciting affirmative proof that he *had* made the admissions testified to by the police officers, but to discredit his evidence given in his own behalf by showing that he had previously told a different story. The evidence of the police officers was offered by the state in chief.

As to the weight of the evidence:

The testimony of the police officers, admitted to be true in several important particulars by the accused himself in the cross-examination referred to, shows that the accused was clearly guilty as charged in the indictment and properly convicted.

Finding no error in the record, and believing that substantial justice was done in this case, the judgment is affirmed.

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**DAMAGES CLAIMED ON ACCOUNT OF AN ABANDONED  
APPROPRIATION OF LAND.**

Circuit Court of Mahoning County.

**JEANNETTE J. JACK V. LAKE ERIE & EASTERN RAILROAD  
COMPANY.**

Decided, December 26, 1911.

*Appropriation Proceeding—Abandonment of—Remedy of Lot Owner.*  
Section 11060, General Code, prescribes the only remedy allowed by law to the owner of property sought to be appropriated in a proceeding brought in good faith and subsequently abandoned.

*S. L. Clark, for plaintiff in error.*

*Arrel, Wilson & Harrington, contra.*

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The parties to this proceeding in error stand here as they stood below. There, the plaintiff commenced her action to recover damages alleged to have been sustained by her in the deterioration caused by the action of the elements, to a partially completed building and to materials intended for the completion of the same, upon a lot owned by her, during the pendency

of appropriation proceedings begun by the defendant and subsequently abandoned by it. The gist of her action lies in the defendant's interruption of her building operations by the commencement of said appropriation proceeding. If the proceeding were prosecuted to judgment and the property taken, she might well have been denied compensation for money expended in the improvement of the property sought to be appropriated during the pendency of the appropriation suit. She claims, therefore, to have been prevented from making use of her property during the period, and to have suffered loss, also, because of damage by the weather to the partially completed improvement of her premises.

She claims here to certain errors in the charge and elsewhere in the record of the trial below. A bill of exceptions was duly perfected, containing a statement of the trial judge of what the evidence tended to prove, and setting out the charge to the jury in full. From this it affirmatively appears that no evidence was offered of any bad faith in the commencement or in the abandonment of the appropriation proceeding. Although that proceeding was not a civil action, we see no reason why the rule laid down in *The Cincinnati Daily Tribune Co. v. Bruck*, 61 O. S. 489, does not apply. The syllabus is as follows:

“As a general rule no suit will lie for the malicious prosecution of a civil action, where there has been no arrest of the person or seizure of property.

“A stockholder of an incorporated newspaper company maliciously and without probable cause, commenced a suit against the company for dissolution and the appointment of a receiver, to the great injury of the company. The application was denied and the suit dismissed. In an action for libel, provoked by the suit, the company by way of counter-claim asked to recover damages for the malicious prosecution of the suit against it. *Held*: That while the facts are sufficiently connected with the subject of the action for the purpose of a counter-claim they do not constitute a cause of action, entitling the defendant to relief by way of damages, as there was no arrest of the person or seizure of property.”

But whether the rule thus laid down be applicable or inapplicable to the malicious prosecution of an appropriation pro-

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ceeding, and irrespective, also, of the presence or absence of the element of malice on the part of the defendant here in commencing and subsequently abandoning the appropriation proceeding, contemplated by the petition, we are of opinion that Section 11060, General Code, prescribes the only remedy allowed by law to the owner of property sought to be appropriated in a proceeding brought in good faith and subsequently abandoned. That section reads as follows:

“The corporation may abandon any case or proceeding after paying into court the amount of the defendant’s costs, expenses, and attorney fees, as found by the court. If the corporation fails in any case to make payment or deposit, as provided in the next preceding section, within thirty days after confirmation of the verdict, on motion of the party entitled to such payment, to be filed within ten days after the expiration of such thirty days, the judge shall enter an order directing the corporation to make such payment or deposit within thirty days after the date of the order. Unless such corporation, within such time makes such payment or deposit, it shall be held thereby to have abandoned the property, rights, or interests so appropriated, and all claims thereon under its proceeding, and the judge shall issue an order to that effect. He also shall enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent and attorney fees incurred by him in the proceeding, as, upon the evidence offered in that behalf, the court deems just, for which execution may be issued against the corporation. The directors of the corporation shall be individually liable upon such judgment, and may be made parties thereto by actions.”

The first sentence of this section obviously relates to a voluntary abandonment of an appropriation proceeding by the plaintiff at any stage thereof, either before or after judgment.

It follows that the plaintiff had no cause of action upon those facts alleged in her petition below, which the evidence tended to prove. This renders the other assignments of error upon the record before us quite immaterial, and the judgment is affirmed.

**FAILURE TO COMPENSATE BY REQUEST FOR SERVICES  
RENDERED.**

Court of Appeals for Carroll County.

LEWIS WALTERS, AS ADMINISTRATOR OF THE ESTATE OF NANCY J.  
WALTERS, v. JOHN D. HEIDY.

Decided, April Term, 1913.

*Compensation for Services—Where Promised to be Made by Will, But  
the Promisor Died Intestate—Statute of Frauds—Limitation of  
Actions.*

W agreed with H that if he would render her certain services she would, in compensation thereof, make a will giving him all the property she owned at the time of her death. H performed services under the agreement. W died intestate. *Held:*

1. H can maintain an action to recover the value of the services so rendered.
2. The statute of limitations does not begin to run against such action until the appointment of an administrator of W's estate.

*Wallace M. Handley*, for plaintiff in error. .

*I. N. Blythe*, contra.

METCALFE, J.; NORRIS, J., and POLLOCK, J., concur.

Defendant in error was plaintiff below. In the second amended petition filed in the case it is averred in substance, that in February, 1890, he entered into a verbal agreement with Nancy Heidy, whereby he agreed to live with her upon her farm, known as the Tom Neely farm, as long as she desired him to do so, and that in compensation for his services to be rendered her in that behalf she agreed to make a will and give to him all the property she owned at the time of her death. That in pursuance of that agreement he did move onto said farm and for a period of about two years gave his work and labor to the said Nancy Heidy, and performed services which he claims were of the value of a thousand dollars. In the meantime Nancy Heidy married Lewis Walters, plaintiff in error in this case, and some time after her marriage with Walters Heidy moved away from the farm.

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Nancy Walters died in 1910 intestate, and after the appointment of an administrator Heidy brought his action to recover the value of the services which he claims to have rendered under his agreement with her. Upon the trial of the case Heidy recovered judgment. A number of questions are urged in argument, but we think the only questions of importance are, whether the action can be maintained, and if so whether it is barred by the statute of limitations.

That the agreement of Mrs. Walters to compensate Heidy for his work by will was within the statute of frauds, and that no action can be maintained thereon for specific performance or for damages seems clear. *Austin v. Davis*, 13 L. R. A., 120; *DeMoss v. Robinson*, 46 Mich., 52; *Wallace v. Long*, 55 Am. Rep., 222; 8 L. R. A., 414; 25 Am. Law Journal, 69.

But if no action can be maintained upon the contract, does it follow that if services are rendered in pursuance of a mutual understanding that compensation shall be made therefor by will, and the party receiving the services dies without making the expected compensation, that the party rendering the services may not recover their value from the estate of the deceased? Without entering into a discussion of this question we think the right to recover in such case is fully sustained by the following authorities: *Robinson v. Raynor*, 28 N. Y., 494; *Martin v. Wright*, 13 Wend., 460; 28 Am. Dec., 468; 41 N. Y., 480; *Jenkins v. Stetson*, 9 Allen, 128; *Wellington v. Apthorp*, 145 Mass., 69; 57 Am. Rep., 759.

It is urged that the statute of limitation began to run at the time Heidy ceased to labor on the farm, and hence that his cause of action is barred. Upon the question of the statute of limitations the trial judge charged the jury as follows:

“If upon consideration of all the evidence adduced on the trial you find that said agreement between plaintiff and decedent as claimed by plaintiff was in fact made, that said plaintiff was to be compensated for said alleged services rendered, and means of support furnished, if any, and that he was not to receive such compensation until the death of Nancy J. Walters then in such event I say to you as matter of law that his cause of action therefor would not arise and would not accrue to him until the date

of said Nancy J. Walters' death, which is admitted to be May 19, 1910, and in such event, plaintiff's cause of action would not be barred by the statute of limitations."

The evidence in this case tends to show that the services which Heidy was to render for Mrs. Walters were to be paid at her death by a provision in her will. The manner in which they were to be paid is a matter of indifference. The question is was the compensation to be made at her death. If Heidy was not to be paid until her death how could a cause of action arise before that time? In the case of *Marsh, Admr., v. Clark*, 11 O. D., 564, it is held that where an uncle agreed to compensate his nephew by will for services that the statute of limitations did not begin to run until the death of the uncle. In *Hoiles v. Riddle*, 74 O. S., 173, the holding is to the effect that in an action on a contract not in writing which became due by the decease of the debtor the cause of action does not accrue until the appointment of an executor or an administrator. We do not think that the fact that the contract in this case could not be enforced specifically makes any difference in the application of the principle announced in *Hoiles v. Riddle*, and that the statute would not begin to run until the appointment of an administrator for Mrs. Walters' estate. And as the death of Mrs. Walters and the appointment of the administrator occurred within six years prior to the commencement of the suit the statement in the charge that the statute began to run at the death of Mrs. Walters is not prejudicial.

Judgment affirmed.

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**INTERFERENCE WITH RAILWAY TRACKS IN BUILDING SEWER.**

Circuit Court of Mahoning County.

**THE MAHONING VALLEY RAILWAY COMPANY V. JOHN GRADY.**

Decided, December 26, 1911.

*Contract—Agreement to so Construct Sewer as Not to Interfere with Railroad—Ordinary Care Measure of Duty.*

Under a covenant in an agreement between a contractor building a sewer in a city street and a street railroad company operating a street railroad in the same street, that the contractor "will construct said sewer south of the south or east bound tracks of second party and far enough therefrom so as not to interfere with said tracks or the ties and foundations supporting the same," ordinary care in the construction of the sewer is the measure of the contractor's duty.

*Arrel, Wilson & Harrington, for plaintiff in error.**S. S. Conroy, contra.*

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The parties to this proceeding in error stand in the relation opposite to that in which they stood below. There the action was brought to recover \$755 with interest, being the balance alleged by the plaintiff below to be due upon an agreement between the parties, as follows:

"This agreement made and entered into by and between John Grady, of Youngstown, Ohio, first party, and the Mahoning Valley Railway Company, a corporation, second party, WITNESSETH, That:

"WHEREAS, first party has a contract with the city of Youngstown for the construction of a sewer from Central Square to Spring Common in said city, and the specifications for said sewer call for its construction in the middle of the street, beneath the tracks of second party, and second party desires to have said sewer constructed south of its south or east bound tracks, and first party is willing to so construct said sewer, under the conditions hereinafter set forth:

"Now, Therefore, first party and second party do agree as follows:

"First. First party agrees that from Central Square to Deibel's store, he will construct said sewer south of the south or east

bound tracks of second party, and far enough therefrom as not to interfere with said tracks or the ties and foundations supporting same; that from Deibel's store to Spring Common, he will construct said sewer far enough from the north or west bound track as not to interfere with the operation and movement of cars thereon, or the ties and foundations supporting said north bound track.

"Second. First party agrees that he will excavate for, furnish all material and labor, lay and construct such lateral sewer connections at such points, in the manner, and in such number, as the city engineer of the city of Youngstown shall designate, and agree to accept in full payment therefor, the sum of one dollar and twenty-five cents (\$1.25) per lineal foot of such lateral sewer connections; second party to pay only for the additional lateral connection required by reason of the construction of the sewer on the south side of Federal street instead of in the center of said street; as originally specified by the city of Youngstown.

"First party further agrees to so construct said sewer as to at all times permit the free operation of cars on the northwest bound track of second party between Central Square and Spring Common, and not to obstruct said track between said points, nor in any manner to interfere with the operation of the cars thereon.

"Second party, in consideration of the agreements of first party, agrees to pay first party the sum of twenty-two hundred dollars (\$2,200.00); and further agrees to remove its south or east bound track between Deibel's store and Spring Common.

"It is mutually understood and agreed, that temporary cross-overs shall be installed at, or near Central Square, and Deibel's store, and at points intervening, in order that the movement of cars between said points shall not be unnecessarily interfered with; and that first party shall prosecute the work of constructing said sewer to its earliest possible completion. It being the intent and purpose of this agreement that the operation of cars on the north or west bound track shall not at any time be interfered with or obstructed or the traffic thereon delayed.

"Third. The terms, conditions, covenants and agreements herein contained shall extend to and be binding upon respective heirs, administrators, successors and assigns of the parties hereto.

"Witness the signatures of the respective parties hereto to duplicates hereof, this 15 day of August, A. D. 1907.

"JOHN GRADY.

"THE MAHONING VALLEY RAILWAY COMPANY,

by R. MONTGOMERY,

"VICE-PRESIDENT.

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“In presence of

“W. H. McMillin.

“The above agreement is approved by us this 16th day of August, A. D. 1907.

“D. HEINSELMAN.

“P. HAGEN,

“J. E. RUDGE,

“*Board of Public Service, Youngstown, Ohio.*”

To this cause of action an answer and cross-petition were filed, admitting the plaintiff's claim, except as the same should be offset by defendant's counter-claim. Upon this matter the defendant alleged:

“That plaintiff, in violation of the terms of said agreement, failed and neglected to so construct said sewer as not to interfere with said tracks and not to interfere with the ties and foundations supporting the same, but did construct said sewer upon such location and in such a manner as that the ties and foundations supporting the tracks of this defendant and the tracks were undermined,—caused to become depressed and out of alignment, and in such a condition as to interfere with and endanger the passage of cars thereover; that upon the completion of said sewer, this defendant was put to large expense by reason of being compelled to re-set said ties, foundations and tracks, and to repair, re-surface, and align the same, and that in consequence of the violation by plaintiff of the terms of said contract above set forth, and in the respects above set forth this defendant company has been damaged in the sum of one thousand dollars (\$1,000).”

Other pleadings were filed by which issue was joined, and upon the trial, plaintiff recovered a verdict and judgment of \$400, which does not allow enough of the counter-claim, according to the plaintiff in error here.

The chief error assigned is upon the court's instructions in the charge to the jury, that ordinary care in constructing the sewer was the measure of defendant in error's duty. It is urged that the court should have charged the jury that the defendant's undertaking to save the railway company's tracks and substructures from injury in consequence of the sewer excavation, was an absolute duty under the terms of the contract.

We recognize that the contract might conceivably have been such as to require the defendant in error at all events to prevent injury to the railway company's property from his work. But as we construe the contract actually made by the parties, it contains no such covenant. Grady agreed to construct his sewer south of the tracks "and far enough therefrom as not to interfere with said tracks or the ties or foundations supporting same."

The court charged, at the request of the plaintiff, and as we think correctly, as follows:

"If you find that plaintiff constructed the sewer in the proper place, that is, as far south as in the situation it possibly could be done, and that, in doing it, he exercised ordinary care, as between himself and the defendant railroad company, then the defendant would not be entitled to be compensated under their counter-claim."

We find no error in this record, and the judgment is affirmed.

#### **ALLEGED SLANDER IN THE PULPIT.**

Circuit Court of Mahoning County.

**THOMAS WILK V. THOMAS ROBERT.**

Decided, December 26, 1911.

*Slander—Words Spoken by Priest in Sermon.*

Unquestionably it is a part of the duty of a priest who has the spiritual charge of his congregation to look after the moral character of those in his church, to reprove them for immorality, and to do it with vigor and earnestly, but he can not charge in public those in his congregation who are not guilty of crime, with being criminals, without being required to respond in damages, as any other man is required to respond.

*David Steiner*, for plaintiff in error.

*W. S. Anderson*, contra.

**HENRY, J.; WINCH, J., and MARVIN, J., concur.**

Thomas Wilk is the priest in charge of a Polish church; Robert is a member of the congregation of said church.

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On the 8th of August, 1909, Wilk preached a sermon to his congregation in which he referred to Taofil Robert, using words which Robert claims to have been slanderous. Robert sued Wilk for this alleged slander. In his petition Robert gives the Polish words which he says Wilk used concerning him, and he gives what he says is the English meaning of the words used, and he says that what was said of him in the sermon means in English that he, Robert, was a knave, criminal, a rogue, a scoundrel, a villain, and a cheat and deceiver.

The evidence shows that at the date named, Wilk preached a sermon to his congregation, in which he named Robert, with others, and used denunciatory language against them. There is a conflict in the evidence as to just what Polish words were used, and the English meaning of the words used is not given the same by all the witnesses, but it is plain, from the evidence of all the witnesses, and from Wilk's own testimony, that he used and intended to use language condemnatory of Robert, and the jury found, by the preponderance of the evidence, that the English meaning of the Polish words used in reference to Robert was substantially as charged in the petition. Without question, if the language used meant to charge Robert with being a criminal, a scoundrel, a villain and a cheat, these words were slanderous, if not true.

The words were uttered in the presence of several hundred people who understood the Polish language. The petition charges that they were false and malicious; that Robert, who carries on a small business at Youngstown, where these words were used, was greatly injured in his business by reason of the utterance of the words.

The defendant below, Wilk, by his answer, denies that he preached any sermon in which he in any manner referred to Robert either directly or indirectly. He says that it is his duty to conduct religious services in the church of which he was pastor, and to celebrate the mass, and to direct and exhort the people over whom he has charge to live honorable and moral lives; and he says that at the date charged, he celebrated mass and preached a sermon to his congregation.

As already said, the evidence clearly shows that Wilk did refer, by name, in the sermon preached on the date referred to, to Mr. Robert, and did use condemnatory language of him by name; but if the language used had only the meaning which some of the witnesses give to it, the words would not be slanderous in the way in which they were used. It was sought to show, on the part of the defendant below, that the priest, by the rules of the church in which he holds the official position of priest, was privileged to use such language of and concerning the plaintiff below as he did use; but if the words used were such as directly charged the plaintiff with being a criminal, when in fact he was not a criminal, the official position of the priest could not relieve him from the responsibility to which any man is subject who falsely charges another with being a criminal.

Unquestionably it is a part of the duty of the priest who has the spiritual charge of his congregation, to look after the moral character of those in his church, to reprove them for immorality, and to do it with vigor and earnestly, but he must not charge in public those in his congregation who are not guilty of crime with being criminals, without being required to respond in damages, as any other man would be required to respond.

We do not feel that, under the evidence in this case, the judgment could be reversed because against the weight of the evidence. It was for the jury to say, and we are not surprised that they reached the conclusion, that the words used were slanderous.

It is urged, however, that the court erred in failing to charge a proposition requested of it. That request reads:

“Where a party makes a communication, and said communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice.”

We think this request was properly refused. Without any qualification of the words used in this request the jury might very well have been misled by it. It can not be questioned that one may say things of another in the discharge of a duty for

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which he would not be responsible as he would in the same sense if he used them simply as a matter of gossip, or for the purpose of circulating a story; but it is never any man's duty to make statements concerning another which charge him with being a criminal, when such statements are not true.

In the charge as given, including the requests made by the defendant below, which were given, the court stated the law as fairly to the defendant below as he was entitled to have it stated. There is but one possible exception to this, and that is the charge as to punitive damages; but upon examination of the whole case, we think the defendant below can have no just complaint as to the charge in this regard. The court said:

"As to punitive damages, that is, 'smart money,' as it is sometimes called, that is, damages in addition to compensatory damages, it is a question that is left with you in your own good sense and judgment to determine whether you will give punitive damages or not. You may give them if you think, upon proper consideration of the case, something ought to be added; you may add something to compensatory damages, and compensatory damages, I may say, include a reasonable counsel fee for the plaintiff for preparing and the trial of the case. But you are not obliged to give punitive damages unless you think it ought to be given; and punitive damages are given for the purpose, not only of punishing the defendant, but also as a warning to others; and that matter is left to the sound discretion of the jury as to whether they will or will not give punitive damages in addition to other damages, if you find for the plaintiff, that is, in addition to compensatory damages."

It is charged in the petition that the words spoken were maliciously spoken. The court did not in this connection say that punitive damages could only be allowed in case the jury found that the words were maliciously spoken, but the court, in an earlier part of the charge, had instructed the jury as to the circumstances and facts under which they might return simply nominal damages, and then as to compensatory damages. We think the verdict itself which was for but \$200, negatives any claim that the jury gave anything by way of punitive damages. The evidence tends to show that the plaintiff below suffered actual damages in his business, and as the amount of the verdict

was but \$200 it seems clear that no part of it could have been given by way of punitive damages.

Considering the entire case, we feel that substantial justice was done by the verdict and the judgment, and said judgment is affirmed.

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**VARIANCE NOT GROUND FOR REVERSAL UNLESS  
PREJUDICIAL.**

Circuit Court of Mahoning County.

**THE MAHONING VALLEY RAILWAY COMPANY v. GEORGE SEEFRED.**

Decided, December 26, 1911.

*Variance Between Pleading and Proof.*

A judgment will not be reversed because of a variance between the pleadings and the proof and omission to conform the pleadings to the facts proved, unless the variance clearly misled the opposite party to his prejudice.

*Arrel, Wilson & Harrington*, for plaintiff in error.  
*Spellman & Hammond*, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

This was an action for personal injuries sustained by Seefred while boarding a car of the railway company. Verdict and judgment were for the plaintiff below.

The plaintiff in his petition alleged that, being at a proper stopping place, he signaled the motorman of the approaching car to stop; that the motorman obeyed his signal and the car came to a stop; that when it had so stopped he attempted to board the car, but before he had opportunity to get securely aboard the car, the conductor gave the motorman a signal to go ahead, and the latter started the car with a violent jerk which threw the plaintiff to the ground severely injuring him.

The petition further alleges that the injuries so received were directly and proximately caused by the sudden starting of the car without giving plaintiff sufficient and reasonable opportunity

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to board it, and without warning him that the car would be so started.

The answer, in addition to containing a general denial, further averred that the plaintiff attempted to board a car not then in condition to be boarded by him, and did so without exercising any care or caution whatsoever.

Upon the trial plaintiff introduced evidence tending to prove all the allegations of his petition, including the averment that the car had stopped before he attempted to board it.

The defendant introduced evidence tending to prove that the car had not come to a complete stop, but had only slowed down, when the plaintiff attempted to get aboard it.

Claiming that the plaintiff could not recover under the allegations of his petition, unless the jury should find that the car came to a complete stop before he attempted to board it, the defendant reserved that point alone for the consideration of this court by exception to the trial court's refusal to charge certain requests preferred by it, both before and after the argument, and by excepting to the charge as given, the same authorizing a verdict for the plaintiff with proper qualifications, in event the jury should find that the car had either wholly stopped or so slowed down as to warrant a reasonably prudent man in attempting to get upon it.

We have here what is technically called a variance, provision for which is made by Sections 11556, 11557 and 11558, General Code, and it becomes important to determine whether the variance in this case was material or immaterial.

The gist of the action was the negligent starting of the car, either from a stop or from slow speed. It is conceded that if the car was started negligently with a jerk, either from a stop or from slow speed, and the plaintiff by reason thereof was thrown from the car, without fault on his part, he could recover.

Had plaintiff in his petition alleged that on his signal the car stopped or slowed up sufficiently for him to step aboard it, the question here made would not have arisen.

The allegations of the petition were proved in their general scope and meaning, and unproved, if at all, only in the unimportant particular that the car had stopped. The case does not

come under the last section of the General Code cited, but under the first section, 11556, which provides:

“No variance between the allegations in a pleading and the proof, shall be deemed material, unless it has actually mislead the adverse party to his prejudice, in maintaining his action or defense upon the merits. When it is alleged that a party has been so mislead, that fact must be proved to the satisfaction of the court. It also must be shown in what respect he has been mislead. Thereupon the court may order the pleadings to be amended, upon such terms as are just.”

The evidence tending to create the variance was introduced by the defendant below. It was properly introduced without objection by anybody.

The record fails to show that by the variance, the defendant was “actually mislead” in maintaining his defense upon the merits.

There is no allegation in the record that the defendant was so mislead at the trial, nor does the record show that it presented such question to the trial judge or undertook to point out in what respect it had been mislead, as required by the statutes.

It is not urged in this court that the defendant company was mislead by the variance complained of, and there is no evidence satisfactory to this court that the defendant was in any manner mislead by the variance suggested, or the neglect of the trial judge to order the petition to be amended so as to cover the possibility and claim that the car had not come to a complete stop.

Indeed, by raising the question in its answer, the defendant may be said to have broadened the issues in the case so that no amendment of the petition was necessary. The trial judge evidently took this view of the matter.

In *Hoffman v. Gordon*, 15 O. S., 211, it was said:

“The evident object of the code is to vest in the court a discretion where it can be done without surprise or injury, to try the case upon the evidence, outside of the pleadings, and if objection be made, to allow the pleadings to be conformed to the evidence at once and without terms.”

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Here no objection was made to the introduction of evidence, no surprise or injury suggested, and no demand made that the petition be amended.

In the case of *Dayton Insurance Co. v. Kelly*, 24 O. S., 345, it was held:

"A judgment will not be disturbed for an omission of the court to order an amendment of the petition so as to make its allegations conform to the facts proved or admitted, where the variance between the allegations in the petition and the proof is not material."

To the same effect is *Sibilia v. Bahney*, 34 O. S., 399.

To have granted the defendant company's requests to charge would have been reversible error. *Banta v. Martin*, 38 O. S., 534, 537.

Section 11364, General Code (formerly R. S. 5115), provides:

"In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party. No judgment shall be reversed, or affected, by reason of such error or defect."

Following this injunction the Supreme Court, in the case of *Benninger v. Hess*, 41 O. S., 64, 69, speaking through Judge Dickman, said:

"Where a judgment has been rendered and there has been a variance between the pleading and the proof, but not such as to mislead the opposite party to his prejudice, and where there has been an omission in such case to conform the pleadings to the facts proved, it will not be in furtherance of justice to deprive the plaintiff of the fruits of the trial, by a reversal of the judgment on error."

By the amendment to said Section 11364, adopted May 10, 1911 (102 O. L., 132), it is provided that no reviewing court shall reverse a judgment for error or defect in the pleadings or proceedings, which does not affect the substantial rights of the party complaining, unless it can certify that substantial justice has not been done.

Being unable to so certify in this case, the judgment is affirmed.

**LIABILITY FOR THEFT FROM A PULLMAN CAR.  
PASSENGER.**

Court of Appeals for Hamilton County.

**ROBERT J. BONSER V. THE PULLMAN COMPANY.**

Decided, April 12, 1913.

*Negligence—Resulting in Loss by Theft—Money and Jewelry Stolen  
From a Sleeping Car Passenger—Company Held Not Liable.*

A sleeping car company is not an insurer of the safety of property belonging to its passengers although held to a high degree of care in its protection, but where the evidence goes to show that a passenger was himself negligent with reference to the care of money and jewelry which was stolen from his berth during the night, a judgment in favor of the company will not be set aside.

*Louis B. Sawyer and Wm. A. Roudebush, for plaintiff in error.  
Mortimer Matthews, contra.*

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

Plaintiff brought this action to recover the value of a diamond ring and money which was lost or stolen out of his trousers pocket while he was a passenger in defendants' sleeping car. Before retiring plaintiff took his valuable diamond ring from his finger and placed it in his trousers pocket, in which he also had \$220 in money in bills. As he was somewhat disabled by lameness and had therefore taken a whole section he caused the porter to hang up his trousers with these valuables in the pockets, on a hook next to the aisle within the curtain of his section and against the partition between his berth and the adjoining one. When he secured his trousers in the morning while dressing, he discovered that his ring and money were gone.

It appears that the trousers could have been reached, by the occupant of the adjoining berth, where they hung through the night, and the pockets could have been rifled without being seen from the aisle, and for that reason the place selected was an unusual or dangerous place for the deposit of plaintiff's money and diamond ring, and plaintiff had reason to know that it could

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not be as effectually guarded there as in some other place he might have selected in his berth.

Plaintiff claims that the trial court erred in refusing to give the following special charge requested by him, to-wit:

"I charge you that defendant was bound to use ordinary care to prevent the theft of plaintiff's money and ring while he was asleep, if plaintiff placed it anywhere in his berth, and plaintiff can not be held guilty of negligence contributing to the loss of his property by placing his money and ring in one place rather than in another in the berth."

This charge if given would remove all possibility of plaintiff being guilty of contributory negligence so long as he places his money and valuables any place within the limits of the berth he is occupying regardless of how or where they might be placed or how accessible they might be to others in the car. It would seem to relieve plaintiff from all duty of exercising ordinary care regarding the safety of his own property. The law of this state does not recognize so lax a rule as to the duty of a passenger.

The law in Ohio requires such a passenger to take ordinary care for the safety and protection of his property, and while the sleeping car company is held to a high degree of care in the protection of plaintiff's property, it does not become an insurer. nor does its duty to relieve the passenger from taking ordinary care for the preservation of his property. The question of whether the company was negligent is for the jury.

The charge of the court below correctly states the law submitting the question of defendant's negligence under the circumstances of the case to the jury and its verdict in favor of defendant is sustained by the evidence. The judgment is therefore affirmed.

**REMEDY OF A LESSEE FOR NINETY-NINE YEARS OF  
PROPERTY FOUND TO BE ENCUMBERED.**

Circuit Court of Cuyahoga County.

GEORGE KING V. ERLA M. BARRY.

Decided, December 16, 1911.

*Lease for Ninety-Nine Years—Reformation—Confusion as to Title—  
Reduction of Rent on Account of Encumbrance.*

1. Where there was no mutual mistake as to the terms of a ninety-nine year lease entered into between the parties, it is no ground for reformation of the lease that the parties were in some confusion as to the encumbrances upon the title of the lessor.
2. Where there is an encumbrance in the nature of an easement upon property which one has agreed to lease for ninety-nine years, and which encumbrance the lessor is unable to remove, the lessee may keep the premises and have his rent reduced proportionately.

*Henderson, Quail & Siddall*, for plaintiff in error.*Smith, Taft & Arter*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

In this action the plaintiffs seek the reformation of a contract of lease entered into between the parties, in reference to certain real estate owned by King in this city, which lease was to continue for a period of ninety-nine years. This reformation is sought on the ground of mutual mistake of the parties.

Without stopping to go over the evidence in the case, it does not appear that there was a mutual mistake, either as to the reading of the contract of lease, or as to its legal effect, but there was some confusion in the mind of King, and perhaps of Barry, as to the state of the title to the south twelve feet of the premises leased. It was known that there had been granted a right-of-way across these twelve feet to an adjoining lot. It was apparently thought by Barry that the rights of the dominant tenant had been forfeited in this right-of-way, and there was doubt in the mind of King on that subject, and without having that matter settled and fixed, the parties voluntarily entered into the lease.

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Prior to the beginning of this action, Barry had made no claim against King because of any encumbrance by way of this right-of-way upon the south twelve feet of the premises leased, but King apprehended that he might make such claim, and he seeks in this proceeding to have the contract of lease so reformed as to relieve King from warranting the title as against such encumbrance.

It would not be profitable to go over in detail the evidence in the case. As already said, we do not find that there was that kind of mistake as would justify granting the prayer of the plaintiff's petition.

The defendant, by way of answer, sets up the fact that there is such a right-of-way existing over this property, or rather admits that the allegations of the petition in that regard are true; and he asks that the court so modify the terms of the lease as to fix an amount that should be deducted from the rental which the defendant undertook by the lease to pay to the plaintiffs for the premises. The evidence on the difference in rental value because of this franchise, when carefully considered, differs very little among the several witnesses. Giving the defendant the benefit of the last evidence produced on the part of the plaintiffs in that regard, which is fully as beneficial to the defendant as any evidence introduced by him or by any of the other witnesses of the plaintiffs, it would seem that the rental of these premises should be reduced one forty-fourth of the rent contracted by the defendant to be paid, and the decree will be that the petition of the plaintiffs be dismissed, that the contract of lease shall be valid as between the parties except that there shall be deducted each year from the rental specified in the contract one forty-fourth part of such rental, leaving the defendant to pay forty-three forty-fourths of the specified rental.

**FIRST STEP IN TESTING THE CONSERVANCY ACT.**

Court of Appeals for Montgomery County.

**EX PARTE DAVID OLDHAM, AS A CITIZEN OF SHELBY COUNTY.**

Decided, March 21, 1914.

*Writ of Prohibition—Fizing Procedure Under this New Remedy—Federal Practice to be Followed—Constitutionality of the Conservancy Act Sent Back for Determination in the Common Pleas Court.*

The writ of prohibition will not ordinarily be allowed until the question of jurisdiction has been made and overruled in the court or tribunal whose jurisdiction is challenged.

*Horace Andrews, H. H. McKeon and P. R. Taylor, for petitioner.*

*John A. McMahon, J. Warren Kiefer, O. B. Brown, John Galvin and E. A. Belden, amicus curiae.*

*C. C. Hall, Prosecuting Attorney, for Shelby County, J. Guy O'Donnell, Prosecuting Attorney, for Miami County, F. G. Long, Prosecuting Attorney, and A. J. Metler, for Logan County, G. S. Thomas, City Solicitor, and Robert A. Black, for City of Troy.*

**ALLREAD, J.; FERNEDING, J., and KUNKLE, J., concur.**

David Oldham, a citizen and tax-payer of Shelby county, petitions for a writ of prohibition against the judges of the courts of common pleas, to restrain them from acting as a conservancy court, upon the ground that the conservancy act is unconstitutional and void.

The preliminary question is whether this court as a matter of right can, or, as a matter of discretion, should entertain the writ in advance of action upon the jurisdictional question by the tribunal whose jurisdiction is questioned.

The writ of prohibition is a remedy revived or brought into the jurisprudence of our state by constitutional amendment taking effect January 1, 1913. This remedy was not intended to become a substitute for, or supersede, the ordinary or usual procedure of courts of general or special jurisdiction.

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The writ must be confined to occasions and causes where the usual procedure is defective or inadequate and where it becomes necessary to subserve the ends of justice.

No better statement of the objects and purposes of the writ can be found than in *Walcott v. Wells*, 21 Nev., 50:

"The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity. Before it should issue, it must appear that the petitioner has applied to the inferior tribunal for relief. The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage and injustice are likely to follow from such action. It does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal. It is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance, for the furtherance of justice and securing order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable."

Spelling, in his work on Extraordinary Relief, Section 1731, says:

"The extraordinary remedy by prohibition is confined at present, as when first employed, only to cases where it appears that the party seeking has an actual grievance and has applied without avail to the inferior tribunal for relief."

The authors of Cyc. (32 Cyc., 624), thus summarize the American and English authorities:

"An application for a writ of prohibition will not be considered, unless a plea to the jurisdiction has been first filed and overruled in the lower court. Until the inferior court has been asked in some form, and without avail, to refrain from proceeding with the trial of a cause, or to dismiss the same, a superior court will not entertain an application for a writ of prohibition."

Exceptions to the rule are noted in the text, but none apply to the present proceedings. Conflicting decisions are also noted.

Many of the cases cited by counsel for the petitioner acknowledge the general rule but originate and justify exceptions

growing out of special circumstances. Some, notably the Arkansas and Colorado cases, are followed by subsequent cases in the same courts acknowledging the general rule.

*City of Little Rock, Ex parte*, 26 Ark., 52:

"Prohibition will not lie to an inferior court, in a cause arising out of its jurisdiction, until that matter has been pleaded in the original court and the plea refused.

"The circuit court will not be presumed to take cognizance of matters not within its jurisdiction."

*Adams County Court v. People*, 11 Pac. (Colo.), 86:

"A petition to have a court prohibited on the ground of lack of jurisdiction from further proceeding in a criminal contempt proceeding is insufficient; it not showing that the jurisdiction of such court was challenged by appropriate plea or motion therein, so as to give it opportunity to pass on the question, as it is not assumed that, had the question been raised there, it would not have correctly ruled thereon."

*Chester v. Colby, Judge*, 52 Cal., 516:

"If the question of the jurisdiction of an inferior court in a case before it has been submitted to that court by an appropriate pleading or objection, a writ of prohibition will not issue to restrain such court from proceeding in the case while the question of its jurisdiction remains undetermined by such court."

*Ex parte Oklahoma*, 220 U. S., 191, 208:

"It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy, is entitled to a writ of prohibition as a matter of right."

The argument is made that when the constitutional convention of 1912 submitted and the people adopted this judicial amendment, it was intended thereby to revive the common law writ as interpreted and practiced in the English courts.

This court will take judicial notice that eminent lawyers of the state were members of the constitutional convention and took a leading part in framing this judicial amendment.

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It is, in our opinion, a more probable inference that the eminent lawyers who framed this amendment and the citizens who adopted it contemplated the writ as known in this state by the practice in the federal court. This inference is strengthened by the close analogy existing between the judicial amendments in other respects to the federal practice.

The general rule above announced is especially applicable to the present proceedings. The enterprise at hand is one of great magnitude and importance. The conservancy act is of necessity comprehensive in its general scope and embraces many details.

The court specially charged with jurisdiction under the conservancy act consists in the present instance of ten judges of the court of common pleas, from the counties affected. These judges from the various courts are learned in the law, and experienced in constitutional interpretation. We think it would be an unjustifiable inference to be indulged in by this court that the conservancy court will not fully consider and correctly determine the constitutional as well as all other questions submitted. If the law should be wrongly interpreted by the conservancy court, there will still be ample opportunity for intervention in an appropriate court before the property of the petitioner can be affected.

For the reasons above stated, the writ of prohibition will be denied, and the petition therefor dismissed.

**CONSTRUCTION OF A BUILDING RESTRICTION.**

Circuit Court of Cuyahoga County.

**CHARLES E. KAPITZKY v. H. W. BROWN ET AL.**

Decided, December 4, 1911.

*Building Restrictions—Porch no Violation, When.*

A porch built upon restricted territory is not a violation of a restriction that the *main body* of any dwelling-house to be erected upon a lot shall be back a given number of feet from the street line.

*H. J. Doolittle and Hoyt, Dustin, Kelley, McKeehan & Andrews, for plaintiff.*

*C. W. Fuller and J. L. Cannon, contra.*

WINCH, J.; MARVIN, J., and HENRY, J., concur.

The plaintiff is not entitled to have Brown's side porch removed. Whatever restriction was originally placed by the Windermere Realty Company in the deeds to the Euclid avenue lots cornering on Idlewood and Rosalind avenues, this restriction had been violated before Kapitzky bought, to his knowledge. He made no objection when the second violation occurred on Miller's lot. His suggestion that these violations were on the corners of Idlewood and did not affect his view on Rosalind, would be of some importance were it not for the specific statement in his own deed as to the nature of the restriction which would be made for his benefit when the Brown lot was sold; that agreement was in accord with the condition apparent to him on the corner of Idlewood.

We hold that the general scheme as to the corner lots, of which he is entitled to the benefit, is that which he agreed to when he accepted his deed, to-wit, that the *main body* of the dwelling-house to be erected on Brown's lot should be back at least twenty feet from the southwesterly line of Rosalind avenue. Brown's side porch, which encroaches upon this twenty feet, is not a violation of the general plan or scheme as thus expressed.

The petition will be dismissed.

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**AS TO THE RIGHT OF MATERIAL MEN TO RECOVER FROM  
SURETIES ON THE CONTRACTOR'S BOND.**

Circuit Court of Cuyahoga County.

**THE CLEVELAND METAL ROOFING & CEILING COMPANY V.  
NICK J. GASPARD ET AL.**

Decided, November 27, 1911.

*Contractor's Bond Given Owner—Material-Man Can Not Sue Thereon.*

A material-man who furnishes material to a contractor which goes into the construction of a building, for the construction of which the contractor has given bond to the owner, conditioned also to "pay, or cause to be paid, all claims contracted in reference thereto for material and labor," can not maintain an action for the value of the material so furnished against the sureties on the bond to the owner, it appearing that at the time said bond was given the claim of the material-man had not been created and that he did not know of the existence of the bond, or rely upon it when he furnished the material.

*F. C. Hartman*, for plaintiff in error.

*Pomerene & Karch*, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

The question in this case is whether a demurrer to the roofing company's petition was properly sustained.

It recites that the roofing company furnished material to the defendant, Nick Gaspard, a building contractor, who had given bond to the owner conditioned for the completion of the work under the contract, and that the contractor would "pay, or cause to be paid, all claims contracted in reference thereto for material and labor."

The petition alleges the terms of the contract and bond, that the plaintiff's claim accrued under the contract and had not been paid, and asks judgment against the obligors on the bond.

The defendant sureties on the bond filed the demurrer in question.

It fairly appears from the petition that at the time the bond was executed and delivered to the owner, the claim of plaintiff

had not been created: it arose afterward in the progress of the execution of the contract; and there is no allegation that plaintiff knew of the existence of the bond and relied upon it when it furnished material to the contractor.

The plaintiff claims a right to recover against the sureties under the rule of law expressed in the case of *Emmitt v. Brophy*, 42 Ohio State, 82, and cases there cited, to the effect that in Ohio an agreement made on a valid consideration by one person with another, to pay money to a third, can be enforced by the latter in his own name.

This general rule, however, has its limitations, as shown by Judge Spear in the case of *Railroad Co. v. Bank*, 54 Ohio State, 60. After explaining the *Emmitt* case and showing that in it the claim of the third person was well known to all the parties, reduced to judgment and a lien on the property conveyed under *Emmitt's* obligation to pay off and liquidate all claims and demands against it, the learned judge, on page 69, observes:

"No one of the cases cited carries the doctrine farther than the foregoing. In no one of them is it held that a right to sue in a stranger can be raised by mere implication. Nowhere is it held that the obligation will attach in favor of future creditors not named and not known, and as to amounts not specified or then ascertainable, to the extent of giving to such creditors a right of action on the contract."

Clearly the roofing company is one of "such creditors" and has no right of action on the bond. The bond sued on in the case of *American Surety Co. v. Reader*, 15 C. C., 47, contained the following covenant:

"We hereby agreeing and consenting that this undertaking shall be for the use of any laborer or material-man having a just claim as aforesaid, as well as for said board of education": (to whom the bond read).

This express agreement was enforced against the surety company: there is no language of similar import in the bond here under consideration, and the case last cited is, for that reason, inapplicable.

Judgment affirmed.

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Trumbull County.

**WHEN RENTS PASS TO THE DEVISEE OF THE LEASED PREMISES.**

Court of Appeals for Trumbull County.

**WILLIAM H. LOVELESS V. THE ERIE RAILROAD COMPANY ET AL.**

Decided, February 19, 1914.

*Devise—Where of Lands Under Lease, the Rents Belong to the Devisee—Landlord and Tenant.*

Rent accruing after the death of the testator, under a lease made by him, passes to the devisee of the premises leased, unless otherwise disposed of by the will, and if paid to the executor of the will, he becomes liable to the devisee for money had and received.

*D. J. Hartwell, for plaintiff.**Washington Hyde, contra.*

POLLOCK, J.; METCALFE, J., and NORRIS, J., concur.

Heard on appeal.

Plaintiff claims that he is the owner of about forty-three acres of land in this county; that under a grant made by Edward Moore, the then owner of this land, the Erie Railroad Company entered upon this land, erected a dam thereon, and are using water therefrom, the railroad company agreeing to pay therefor \$100 per annum. Plaintiff claims this money by reason of the devise of this land to him by will of Edward Moore.

The plaintiff brought this action to recover from the railroad company the amount due under this contract after the property vested in him. He made Samuel Q. Marsh, executor of the will of Edward Moore, a party defendant with the railroad company.

The defendant railroad company by its answer alleges that it had paid the money claimed by plaintiff to its co-defendant, prior to the beginning of this action.

Samuel Q. Marsh, as executor of Edward Moore, answered admitting that he had received this money from the railroad company but alleged that both plaintiff and Frances Gleason claimed the money, and asked that Frances Gleason be made a party defendant.

Frances Gleason answered that she was the residuary legatee in the will of Edward Moore, and claimed the money by reason thereof.

Such proceedings were had that the money in the hands of Samuel Q. Marsh, executor, was paid into court, and the railroad company and Marsh were dismissed from the further proceedings in this case, leaving the plaintiff and Frances Gleason to contest the right to the money.

In 1903 Edward Moore was the owner of this forty-three acres of land; and prior to that time there had been a coal mine on adjoining lands, the water from this mine discharging through the entry was collected at the mouth of the entry by the railroad company and piped to its water tank.

After the railroad company had used this water for some time, a new opening near the lands of Moore was made into this mine which changed the course of the water and caused it to flow through this new opening on to the forty-three acre tract owned by Edward Moore.

The railroad company about 1903 then entered into a verbal contract with Edward Moore by which he granted to the railroad company the right to build a dam on his land, and force the water back through this new opening and cause it to flow through the old opening, and for this right the railroad company agreed to pay Edward Moore one hundred dollars per year.

Moore agreed to embody this verbal agreement in a letter directed to the company, which he afterwards did, and the letter was received by the railroad company. No other agreement was ever made between Moore and the railroad company, and the letter written by Moore was lost prior to the trial of this case in the court below. From the time this contract was made until the bringing of this action, the railroad company continued to use these premises under this contract, and until the death of Edward Moore paid him the contract price, and after his death it continued to pay to his executor.

The amount of money that accrued after the death of Edward Moore is claimed by both the plaintiff and Frances Gleason in this action, under the provisions of the will of Edward Moore.

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Edward Moore died in March, 1909, leaving a will which was probated. By the third clause of this will he devised this forty-three acres of land to the plaintiff. Frances Gleason is the residuary legatee under the will of Edward Moore, and all the debts and special legacies of the estate have been paid.

The plaintiff claims that the money paid by the railroad company for the right to occupy the premises devised to him by the will of Edward Moore, and which accrued after the death of Moore, should go to him by reason of this devise; while Frances Gleason claims that the money paid by reason of this grant, whether it accrued after or before the death of Edward Moore, is part of his personal estate and should be collected by his legal representative and distributed to her as residuary legatee.

This brings us to the question whether rent paid as consideration for a grant or lease of real estate made in the life time of the testator, but which accrues after the death of the testator, goes to the devisee of the leased premises, or is an asset of the testator's estate.

Rent may be defined to be the consideration agreed to be paid by one party for the use and occupancy of the real estate of another. *Clark v. Cobb*, 121 Cal., 600 (54 Pac., 74); *Fisk v. Brayman*, 21 R. I., 195 (42 Atl., 878).

The right to receive rent by one from another arises by privity of estate rather than by contract. A contract fixes the amount of land, and the terms of payment, and the manner of the use of the estate, but the right to recover the rent depends upon the ownership of the reversion. *West Shore Mills Co. v. Edwards*, 33 Pac., 987.

A transfer of the reversion, during the term of the lease, carries with it the right to the unearned rent, and the transferee can prosecute an action for its recovery, unless it is specifically reserved. *Watson v. Penn, Guard.*, 8 N. E., 363; *Evans v. Enloe*, 36 N. W., 22; 1 *Washburn on Real Property*, Section 699.

Rent accruing after the death of the testator under a lease made by him belongs to the devisee, unless specially excepted by the terms of the will. *American Law of Administration* (Woerner), Section 300; *Lightner v. Speck*, 28 S. E., 326; *Anderson v. Richards*, 37 S. W., 62.

Rent paid to the grantor under a lease made by him accrued after his conveyance of the real estate, if collected by the grantor can be recovered from him by the grantee as money had and received.

In the case of *Van Wagner v. Van Nostrand*, 19 Iowa, 422, the court said:

"Unaccrued rent, under a lease existing at the date of a conveyance of the real estate, passes to the grantee, and he can collect it by virtue of the grant; and the grantor has no right to receive rent becoming due after such conveyance; but his liability to the grantee for such rents collected would be for money had and received, and not for a breach of the covenant."

Rent collected by an administrator or an executor which accrued after the death of the testator is held by him in trust for the heirs of the estate or the devisee, and they can recover from him. *1 Washburn on Real Property*, Section 699; *American Law of Administration* (Woerner), Section 513.

This grant by Edward Moore was not executed with the formalities required by the statute and did not provide the time for which it was to run. For these reasons Mrs. Gleason claims that the grant made by Edward Moore to the railroad company was a mere license to the railroad to go upon his land for the purpose of securing this water, and so long as he permitted it to use the land for this purpose he should be paid \$100 per year.

The railroad company took possession of the land under this grant and all its terms were fully carried out and complied with by both the grantor and grantee during the life of Edward Moore. This created a tenancy at will which existed until the death of Edward Moore. It is true that on the death of the lessor the tenancy at will terminated, and it became a tenancy by sufferance. The only change this made in the rights of the parties was that the devisee would have a right to terminate the lease without giving the notice required by a tenancy at will, but his continuance of the lease by acquiescence in the lessor's possession and demanding the consideration converted it again into a tenancy at will.

But we need not further consider the rights of the devisee and the railroad company, after the vesting of the reversion in

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these premises in the devisee, for the reason that no change in their relations could inure to the benefit of the estate of Edward Moore.

The devisee would have a right to all the rents which accrued after the death of Edward Moore, whether they arose from the grant made by Moore to the railroad from the new relations created after his death between the devisee and railroad company.

An order may be made directing the clerk to turn over the money now in the hands of the plaintiff, and a judgment entered against the defendant, Frances Gleason, for the costs.

#### AS TO THE VALIDITY OF GIFTS INTER VIVOS.

Court of Appeals for Columbiana County.

ZILPHA R. AMBLER, ADMINISTRATRIX, ET AL  
v. J. C. BOONE, ADMINISTRATOR.

- Decided, April 9, 1914.

*Gifts—Test as to the Validity of, Where Made Inter Vivos, is Surrender of Dominion—Retention of Dominion Over Money by Taking Conditional Promissory Notes Upon Which Suit Was Brought by the Administrator.*

1. When money is given intending to make a gift, but at the same time the donee's note is taken for the amount given payable to donor on demand, and containing therein a stipulation that the note was not negotiable and void in the hands of any other party, except the payee, and in case no demand is made by payee before her death, it shall be considered paid in full and void as against her estate; and providing that the only way demand for payment can be made by payee hereof shall be by leaving this note with the cashier of certain banks with instructions given in person by payee to collect the same, does not make a valid gift *inter vivos*, where the payee retained possession of the note at her death, but it becomes an asset of her estate.
2. To constitute a gift *inter vivos*, there must be an immediate and irrevocable delivery of the property and a relinquishment of all dominion over or right to recall the gift.

*Carey & Armstrong*, for plaintiffs in error.

*J. C. Boone and C. S. Speaker*, contra.

POLLOCK, J.; METCALF, J., and NORRIS, J., concur.

The defendant in error brought an action in the court of common pleas of this county against the plaintiff in error on two promissory notes. The first note reads as follows:

“SALEM, OHIO, November 23, 1898.

“On demand after date for value received, we promise to pay Frances Ann Phillips, the sum of seventy-seven hundred and fifty (\$7,750) dollars without interest.

“This note is not negotiable, and is absolutely void in the hands of any other party than Frances Ann Phillips, as against the maker thereof. In case no demand is made for the payment of this note by Frances Ann Phillips, the payee herein, before her death, this note shall be considered as paid in full, and after the death of said Frances Ann Phillips, payee herein, shall be void as against the makers herein or his estate. The only way in which demand for the payment of this note can be made by the payee herein before her death, shall be by leaving this note with the cashier of the First National Bank of Salem, Ohio, or the cashier of the Farmer's National Bank of Salem, Ohio, with instructions to said cashiers, given in person by said payee herein to collect the same.

“HANNAH L. TOLERTON,

“SARAH E. BUCK,

“ZILPHA ROSELIE TOLERTON.”

No payments are endorsed on this note.

The second note is the same as the first mentioned except that it calls for \$3,000, with interest at the rate of five per cent, per annum, payable annually. Payment of interest is endorsed on this note up to November 23d, 1903.

One of the makers of these two promissory notes, Hannah L. Tolerton, is the widow of James Tolerton, and the remaining makers are the daughters of James Tolerton. James Tolerton died about December 17th, 1897, leaving a will, and by his will he devised all of his property to his wife and two daughters—the makers of these promissory notes.

Frances Ann Phillips, the payee of these notes, was a sister of James Tolerton, and she was married to A. H. Phillips in

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1866. They continued to live together as husband and wife from that time to the time of her death in November, 1904. At the time of her death she had no children living, nor their direct heirs. Prior to the death of James Tolerton, Mrs. Phillips gave to him the amount of money represented by these two notes, and took from him two promissory notes exactly like the notes signed by the defendants below.

After the death of James Tolerton, Mrs. Phillips told the defendants below that if they were going to divide up the estate of her brother she wanted live notes, and the present notes were then given by the defendants in lieu of the ones she held given by James Tolerton.

Mrs. Phillips gave this money to her brother intending, unless it should be demanded by her during her lifetime, that it should be a gift to him. About the time that she gave this money to her brother James, she gave something near the same amount to her remaining brother, taking from him notes similar to the ones in suit. She said that she gave this money to her brothers because she wanted her money to remain in the Tolerton family, and did not want any of it to go to her husband. She even sought legal advice whether she could make a will and deprive her husband of all rights in her property. At the time the notes in suit were executed by the defendants below no money was paid to any of them, and the only consideration for the giving of these notes was the release by Mrs. Phillips of her claim against the estate of James Tolerton. The making of these notes was intended by Mrs. Phillips, and the widow and daughter, as a transfer of the gift made to James Tolerton to his widow and daughters, upon the same conditions as he had received the money.

The notes involved in this action, after the death of Mrs. Phillips, were found in her private box in the Farmers' National Bank in Salem, Ohio, with other private papers belonging to Mrs. Phillips. These notes were in a sealed envelope marked, "H. L. Tolerton." Mrs. Phillips died while in the city of St. Louis. Before leaving home she had given Mrs. Ambler, one of the defendants below, the key to this private

box, and an order on the bank to deliver the box to Mrs. Ambler, with directions to Mrs. Ambler that in case of her death Mrs. Ambler should secure the box and destroy these notes. These directions were not carried out by Mrs. Ambler.

A. H. Phillips, the husband of Mrs. Phillips, had no knowledge during her lifetime that she had given her money to her brothers. Neither had he any knowledge of the notes given by her brothers, or of the notes given by the defendants below to her as evidence of this money. James Tolerton left an estate sufficient to pay all of his indebtedness, including the notes held by Mrs. Phillips referred to above.

A jury was waived in the court below and the case submitted to the court, resulting in a judgment in favor of the plaintiff below.

In giving this money to her brother, Mrs. Phillips intended to make a gift to him, unless during her life she should for some reason change her intention and should personally demand the payment of these notes. She was unwilling to part with her property at that time, or to surrender her right to demand its return. The question then arises, did the giving of this money unrevoked by the personal act of Mrs. Phillips prior to her death, make a valid gift, or did the retention by Mrs. Phillips of the right to demand payment destroy the necessary elements of the gift *inter vivos*, and leave nothing more than the intention to make a gift?

In order to make a valid gift *inter vivos* there must be a voluntary and absolute delivery of the property, and all control and dominion over the property must be relinquished. *Phipps v. Hope*, 16 O. S., 586, 595; *Flanders v. Blandy*, 45 O. S., 108, 113; *Worthington v. Redkey*, 86 O. S., 128.

In the case last cited Justice Davis, in the opinion on page 134, says:

“Whether a gift is *inter vivos* or *cause mortis* • • • there must be such a distinct and absolute delivery of the property as to show a relinquishment of all dominion over the property by the donor.”

Of the many cases in other jurisdictions which have affirmed this rule we will only note the following: *Dauhispeck v. Biggs*,

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71 Ind., 255; *Richardson v. McNulty*, 24 Cal., 139; *Walsh Appeal*, 122 Pa. St., 177 (15 Atl., 470); *Liebe v. Battman*, 56 Pac., 179, 180; *Lusenbigler v. Gourly*, 59 Pa. St., 166 (94 Pa. Amer. Dec., 51); *Smith, Admr. v. Dorsey*, 38 Ind., 541 (10 Amer. St., 118); *Calvin v. Free*, 71 Pac., 823.

In the opinion in this last case on page 825 the court, after quoting the definition of a gift *inter vivos* as given in the 14 American & Eng. Enc., second edition, 1015, say:

"This definition implies that the donor must, at the time of making the gift, part with all dominion over it; that he can not make a valid gift of this character and yet retain to himself the right to recall or redirect it. The gift must be absolute and irrevocable."

Again, in the case of *Rodemer v. Rettig*, 71 Southwestern, page 869 (Kentucky), which was an action on a note after the death of the payee, containing a provision that the note should become null and void on the death of the payee, it was held that it did not constitute a gift *inter vivos*. In the opinion in that case on the same page the court say:

"It is essential to the validity of a gift *inter vivos* or *causa mortis* that there shall be a delivery to the donee, and the property or thing given must immediately pass and be irrevocable by the donor."

Without doubt, Mrs. Phillips when she gave this money to her brother intended that it should become her brother's at her death, and to deprive her husband of his right to inherit it; but she was unwilling to surrender her personal right to demand and retake possession of this money at any time during her life. From the time she gave the money to her brother, up until the moment of her death, the money which the notes represented was her property, and she never relinquished her ownership in it. Her act in giving the money to her brother was nothing more than an attempt to make a testamentary disposition of her property without following the legal requirements of this state. It did not become a gift during her life for the reason that she was not willing to, and did not, lose control of it.

While she delivered the money to her brother, yet she retained a right to recall that delivery and retake the property at any time.

But it is urged that she delivered the money to her brother without retaining the right to repossess herself of this money; that all she did was to retain the right to demand and receive the equivalent of what she had given. But we must remember that money is not itself property, but is only a circulating medium which represents property. When she retained the right to compel her brother to pay her back an equal amount of money, she was retaining the right to repossess herself of the thing given, just the same as if she had given a specific article of personal property with the right to demand a return of that property. She gave that which represented property, and received the right to demand the return of that which represented property.

Our attention has been called to the cases of *Perrin Ex's v. Chandler*, 17 L. R. A. (New Series), 1239, which was an action by an executor to collect a note, with a forfeiture clause, on the death of the payee, something similar to the notes in this action; and also to the case of *Sabrell v. Couch*, 55 Ind., page 122, which was an action upon a mortgage, after the death of the mortgagee, containing a provision that it was only to be paid when demanded by the mortgagee in person.

In both of these cases it was held that they could not be collected after the death of the payee and mortgagee, but in neither of these cases does the court discuss the proposition as to what is required in order to constitute a valid gift *inter vivos*; but in these cases the court seems to have overlooked the rule that in order to make a gift not only delivery must be made, but the delivery must be irrevocable, and all control and dominion over the property must be surrendered.

The rule requiring an irrevocable delivery and a surrender of all control over the thing given, in order to make a valid gift *inter vivos*, has been applied without exception by the Supreme Court of this state whenever that question has been before the court.

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In addition to the failure to deliver this money irrevocably, and to surrender the right to retake it, there is the further element of fraud in the act of Mrs. Phillips upon her husband. She gave her property to her brothers in order to keep it in her family, and deprive her husband of his marital rights in it. And in order to better secure the carrying into effect of this intention at her death, she provided for the destruction of the evidence of indebtedness in case of her death while away from home.

The law recognizes the right of the owners of personal property to dispose of it as they think best during their life, even to the making of a *bona fide* gift of it, providing the gift is not made in expectation of death, and with a view to defeat the husband or wife of their right in the property. *Stone v. Stone*, 18 Mo., 390; *Tucker v. Tucker*, 19 Mo., 350; *Manikee v. Beard*, 85 Ky., 20.

"A conveyance by the husband shortly before his death of all his property, both real and personal, to his children, without any valid consideration and with the intent to defraud his wife of her dower and her share of the personal estate, securing at the same time to himself the possession, use and control of it during his life, is fraudulent against the claims of the wife and will be set aside. *Thayer v. Thayer*, 14 Ver., 107.

While our own Supreme Court has not passed directly upon this principle, yet in the opinion in the case of *Doyle v. Doyle*, 50 Ohio St., 345, it is referred to favorably. Courts will not lend their assistance, by relaxing the rules required to make a valid gift, in order to carry into effect the intention to make a gift where the result would be to deprive the husband or wife of their rights in the property of the other.

"Our laws relating to written and nuncupative wills, and our laws of descent, should not be defeated by such gifts unless in a very clear case." *Miller v. Anderson*, 43 Ohio St., 473.

But it is urged that even if the giving of this money by Mrs. Phillips to her brother was an attempt to make a gift which has failed, yet the transaction between the defendants below and Mrs. Phillips was a contract by which she agreed to surren-

der her claim against the estate of James Tolerton on condition that these defendants, who were the beneficiaries under his will, should enter into the agreement evidenced by these two notes.

Without doubt parties could enter into an agreement, for a proper consideration, by which they agreed to pay the amount evidenced by such an instrument, if demanded according to the terms of the instrument, and should not be required to pay under any other conditions; but an examination of the testimony in this case develops the fact that that was not the transaction that these parties were entering into. All Mrs. Phillips was doing, or the defendants were accepting, was a transfer of the intended gift to them that she had previously made to her brother, and on the same terms and conditions that she had attempted to make it to her brother.

Mrs. Phillips looked upon this transaction as an intended gift, unless she should desire to use the money otherwise during her lifetime, and these people accepted it and made the two notes in this suit with that same object in view.

For these reasons we think they stand in the same relation to this transaction that James Tolerton would have done had he outlived his sister.

Our conclusion is that however clear the intention of Mrs. Phillips may appear to have been to give the money represented by these notes to her brother, and after his death to his wife and children, the transaction lacks the necessary elements to establish a valid gift. The judgment of the common pleas court is affirmed: no penalty. Defendant excepts.

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**AS TO EVIDENCE OF THE VALUE OF HOUSEHOLD GOODS  
DESTROYED BY FIRE**

Circuit Court of Cuyahoga County.

**THE GERMAN FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,  
v. DUNCAN BURKE.**

Decided, November 27, 1911.

In an action on a fire insurance policy, covering household goods, the owner may give his opinion as to the value of his own property and evidence of its cost is some evidence of its actual value.

*C. W. Fuller and L. R. Canfield*, for plaintiff in error.  
*R. E. McKisson*, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

In this action we are asked to reverse a judgment on a fire insurance policy.

It is claimed that the judgment is not supported by the evidence in that the insured failed to show that he made proper proof of loss under the terms of the policy and that he failed to show, by any competent evidence, what was the value of the goods destroyed.

The company had immediate notice of loss and sent a man the same day to investigate it; the insured appears to have gone to the office of the state fire marshal, and testifies that he there made proof of loss, swore to it and delivered the same to the man who came to inspect the loss. The agent of the company says he never received this. Notification of loss and list of goods destroyed and their value was made out by counsel for the insured, and mailed to a soliciting agent of the company. While at first denying receipt of these letters, the original turned up at the trial in the hands of the proper agent. The clerk of insured's counsel testifies that the list was sworn to by the insured, as he does himself. The company fails to produce this sworn statement, but does produce the list, without affidavit attached.

On a careful reading of the evidence, we think the jury might well have found, as it did, that the insured furnished proof of loss as required by the policy.

And the only evidence as to value of the goods destroyed was given by the insured and his wife and one Fay, a mover, whose testimony was objected to. Fay was qualified by the cross-examination of the company.

An owner can always give his opinion as to the value of his own property. This the insured did, giving the cost of the various items destroyed. The wife testified to the same. This was *some* evidence of the *actual* value of the goods. These witnesses could have been cross-examined as to how long the insured had owned them and their condition, showing wear and tear, etc. The company could have introduced other evidence tending to show a lower value to the goods, due to depreciation. This it did not choose to do.

The evidence seems to fully sustain the verdict, and finding no prejudicial error in the record, we are able to certify, as required by law, that substantial justice was done by the complaining party.

Judgment affirmed.

**CONSTRUCTION OF THE SAFEGUARDING OF MACHINERY  
STATUTE.**

Circuit Court of Cuyahoga County.

**PIETRO SPANO V. THE BROOKSIDE BRICK COMPANY.\***

Decided, November 27, 1911.

*Employers' Liability Act—Common Law and Statutory Cause of Action May be Joined—Section 1027, General Code.*

1. In Section 4364-89c, Revised Statutes, which provides for the enclosure, with substantial railing, of all openings through floors, through, or in which wheels or belts may operate, the words "other kind of machinery," means "other machinery of the wheel kind."
2. The common law and statutory cause of action for damages resulting from the negligence of an employer may both be set up and joined in the same petition.

*H. F. Payer, D. B. Nicola and Ulmer & Bernstein for plaintiff in error.*

*Russell & Eichelberger, contra.*

WINCH, J.; MARVIN, J., and HENRY, J., concur.

This was a personal injury damage case, with verdict directed for the defendant, at the close of plaintiff's evidence.

Counsel for plaintiff states the facts of his case as follows:

"The plaintiff was employed by the defendant in its brick plant located near Brookside Park in the city of Cleveland. The room to which the clay is brought for the purpose of being made into brick is about 20 feet long and 11 feet wide, in the floor of which are two openings about 9 feet apart. These openings are near a track running the length of the room and raised about two and one-half feet above the floor of the room, over which track the cars of clay are drawn by cable. In the operation of the said plant, when the cars reach one or the other opening in the floor the clay is dumped into said opening and on the surrounding floor space.

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\*Affirmed without opinion, *Brookside Brick Co. v. Spano*, 87 Ohio State, 515.

"These openings are about  $1\frac{1}{2}$  feet wide and 2 feet long in which, about 9 or 10 inches below the surface, are two wheels. One of these wheels is about 9 inches and the other is about 18 inches in diameter, the said wheels being close together underneath said opening. The nearest point of one wheel to the other directly under said opening is 18 inches below the level of the floor. The smaller wheel has teeth running its full length, which teeth or knives are 5 or 6 in number and are one inch in thickness and one inch in height. In the operation of said plant the wheels rotated rapidly in opposite directions and the teeth of one wheel would catch the clay as it was thrown down on top of them and cause the same to be crushed and pushed between the two wheels and down below where it was conveyed to other parts of the plant.

"In the operation of said plant, one workman would work at one opening and the other at a second opening, and it was at one of these openings that the plaintiff worked when he was injured. The evidence showed that in the operation of said plant and on the day that the plaintiff was injured, the room was full of clay and as the clay went down into the opening, it left a funnel-shaped opening above the floor; that the plaintiff, who had gone to work at this place two days before the injury happened, had been merely told to shove dirt in the opening; that he first cleaned some of the dirt around the edge of the opening and then was standing by the edge of said opening pulling the dirt into it, when he reached for a pick about a foot and a half from him. As he did so he slipped and his leg went into the opening, was drawn between said wheels and crushed, necessitating amputation about 5 inches from the hip. There was no railing or anything else over or around the opening wherein the plaintiff was injured."

Manifestly no case was made under the common law rule of assumed risk. Plaintiff claims, however, that he made a case under the statute, then Revised Statutes Section 4864-89c, which abolishes the rule of assumed risk as to factories and workshops, and limits the recovery to \$3,000.

The part of that statute which requires construction here reads as follows:

"Owners and operators of factories and work shops, which terms shall mean all manufacturing, mechanical, electrical and mercantile establishments, and all places where machinery of any kind is used and operated, shall take ordinary care and

make such suitable provisions as to prevent injury to persons who may come in contact with any such machinery or any part thereof; and such ordinary care and such suitable provisions shall include the enclosure of all exposed cog-wheels, fly-wheels, band-wheels, all main belts transmitting power from engine to dynamo, or other kind of machinery, and all openings through floors, through, or in which such wheels or belts may operate, with substantial railings."

We do not think, as claimed by plaintiff, that the machinery in question can be called cog-wheels, but we are of opinion that it comes under the class of "other kind of machinery," as used in the statute. That phrase, used after the words "cog-wheels, fly-wheels, band-wheels," means "other machinery of the wheel kind." This was machinery of the wheel kind; the statute provides for the enclosure of all openings through floors, through or in which such wheels may operate, with substantial railing; there was no such substantial railing around the opening in the floor in which the wheels were operating which injured plaintiff; it is apparent from the record that there could and should have been such railing in this case, and that if it had been there, Spano would not have been hurt.

The statute was violated and therefore Spano was entitled to recover under it, not exceeding \$3,000. He prayed for a judgment in the sum of \$10,000, which would indicate that he also hoped to recover under the common law.

If the petition is to be held as an attempt to join the common law and the statutory causes of action, we see no objection thereto. Labatt, in his work on Master and Servant, at Section 734, says that such joinder is customary in England, and has never been questioned in Massachusetts and Alabama, jurisdictions where they have had the statutory action longer than we have had it in Ohio.

For error in directing a verdict for the defendant, the judgment is reversed and the cause remanded for a new trial.

**WANT OF PROBABLE CAUSE FOR PROCURING ARREST.**

Court of Appeals for Pickaway County.

**FRANK S. JENNINGS v. CHARLES SHEPHERD.**

Decided, May 28, 1914.

*Malicious Prosecution—Discharge of Accused by Examining Magistrate Prima Facie Evidence of Want of Probable Cause.*

In a suit for malicious prosecution, proof that the defendant filed an affidavit, in a mayor's court, charging the plaintiff with forgery and that, in consequence, he was arrested and imprisoned, and that, on the preliminary hearing, after witnesses were sworn and examined he was discharged, is *prima facie* evidence of want of probable cause

Error to the Court of Common Pleas of Pickaway County.

Plaintiff in error, defendant in the court of common pleas, filed an affidavit, in the mayor's court of Circleville, charging Shepherd with forgery.

The defendant in error was arrested and imprisoned, and after a trial by the mayor, in which witnesses for the state and defendant were examined, he was discharged. He thereupon brought this action for malicious prosecution and recovered a judgment for \$400.

C. A. Leist and G. G. Adkins, for plaintiff in error.

George W. Morrison and Charles Gerhardt, contra.

SAYRE, J.; WALTERS, J., and JONES, J., concur.

The trial court charged the jury as follows:

"The fact that the mayor discharged the plaintiff because he did not find him guilty of the charge on which he was arrested is *prima facie* evidence that said criminal prosecution and arrest was without probable cause, but it is not conclusive evidence thereof. By *prima facie* evidence it is meant such evidence as creates a presumption that these facts are established by it in the absence of any evidence to the contrary. In other words, it is a sufficient way to establish the disputed facts until they are rebutted or overcome by evidence to the contrary."

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It is contended on behalf of plaintiff in error that proof of a discharge by an examining magistrate is not *prima facie* evidence of want of probable cause and that the question has been decided by the case of *John v. Bridgman*, 27 O. S., 22-39. But it will be seen that the statement of Judge Whitman, who wrote the opinion in that case, is an *obiter dictum*, because when he used the language that "the mere fact of acquittal and discharge by the magistrate was not enough" to show want of probable cause, he was discussing the question as to whether the plaintiff in the suit for malicious prosecution could show that no evidence was offered, before the magistrate, by the complainant to establish the charge contained in the affidavit. The question as to whether such discharge is *prima facie* evidence of want of probable cause was not one of the assignments of error and did not arise in the case.

Section 13511 provides:

"When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of said accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty he shall order him to enter into a recognizance • • • otherwise he shall discharge him." • • •

By virtue of Section 4542 the mayor of Circleville had the jurisdiction conferred in Section 13511 on a charge of forgery.

Hence, the question inquired into, by the magistrate, and the one he had authority to determine, was the one as to probable cause, and a finding was made that there was no probable cause to believe that Shepherd was guilty of the crime of forgery.

Was this finding *prima facie* evidence of a want of probable cause in this case?

The decisions of courts of last resort on this question are not in harmony. The following is a partial list of those holding that the discharge, by the magistrate, on a preliminary hearing, is *prima facie* evidence of the want of probable cause: *Stubbs v. Mulholland et al* (Mo.), 67 S. W., 650, 658; *Jones v. Finch* (Vir.), 4 S. E., 342; *Brown v. Vittur* (Lou. Ann.), 17 So., 193; *Ross v. Hixon*, 46 Kan., 550 (26 Am. St., 123); *Smith v. Clarke* (Utah), 106 Pac., 653; *Frost v. Holland*, 75 Mo., 108; *Munns v.*

*Dupont et al*, 1 Am. Lead Cases, 184; *Johnson v. Chambers*, 32 N. C., 287; *Vinal v. Core, etc.*, 18 W. Va., 42; *Eggett v. Allen* (Wis.), 96 N. W., 803; *Barlight v. Tammany*, 158 Pa., 545; 28 Atl., 135 (38 Am. St., 853).

The case of *Davis v. McMillan* (Mich.), 105 N. W., 862, reviews a number of decisions on the subject and especially those holding that the discharge by the magistrate is not *prima facie* evidence of the want of probable cause, and among them is the case of *Israel v. Brooke*, 23 Ill., 577, in which the writer of the opinion undertakes to state the reasons for holding that a discharge, by the magistrate, is not *prima facie* evidence of the want of probable cause, thus:

" \* \* \* How many justices are there in obscure localities who are as little capable of determining what is probable cause for a criminal prosecution as they are of explaining any of the phenomenon of nature? How many do we find prejudiced against a public accuser, how many in sympathy with the accused? The decisions of such an official on intricate questions of law or fact should not weigh against the accused and they do not practically; for, if he is committed, the grand jury pay no attention to the finding of the magistrate. It is not *prima facie* evidence of his guilt, and how preposterous it is to say the discharge of a criminal is *prima facie* evidence of want of probable cause. It is not so and should never be so regarded!"

This line of reasoning, which is quoted in *Davis v. McMillan*, *supra*, with approval, leads to an entirely erroneous conclusion.

Public officers are presumed to do their duty and their acts are presumed to be regular. While courts of general jurisdiction and of review may not indulge these presumptions in all respects as to courts of inferior and limited jurisdiction, yet they will presume that magistrates have intelligence enough to pass upon the questions which they are required to pass upon and that they do act honestly. Where a court of limited and inferior powers has acquired jurisdiction, its acts are presumed to have been rightly and honestly done. The fact that some magistrates may be ignorant and liable to be prejudiced does not overthrow the presumption. When a public officer, charged with the duty of determining a controversy, performs that duty the inference naturally and logically arises that

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his determination was just. Hence, since magistrates in our state are charged with the duty of determining the question of probable cause in criminal cases, such determination, in the absence of any other evidence, ought to be and is *prima facie* evidence of the fact determined. But this is true only when such magistrate has held a preliminary trial and has heard the evidence produced, because only then can he pass upon the question of probable cause.

The charge of the trial court in this respect was not erroneous.

#### NO APPEAL FROM THE SUPERIOR COURT.

Court of Appeals for Hamilton County.

THE POSTAL LIFE INSURANCE CO. v. HORACE W. HARMAYER  
ET AL.\*

Decided, March 14, 1914.

There is no right of appeal from the Superior Court of Cincinnati to the Circuit Court of Appeals.

*Frank H. Kunkel*, for motion to dismiss appeal.

*Thos. L. Michie*, contra.

BY THE COURT (SWINE, O. B. JONES and E. H. JONES, JJ.)

It was held in the case of *Thompson, Adm'r, v. Gest St. B. A.*, 13 C. C., 250, that as the law then was there was no right of appeal from the Superior Court of Cincinnati to the circuit court. There has been no change in the law, organic or otherwise, since the decision in that case, affecting the question.

The motion to dismiss the appeal is sustained. Case above cited followed and approved.

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\*For opinion below, see *Postal Life Insurance Co. v. Harmeyer*, 15 N.P. (N.S.), 476, and opinion following.

**CONSTRUCTION OF THE STATUTE SAVING A CAUSE IN CASE  
OF REVERSAL.**

Circuit Court of Cuyahoga County.

**PASQUALE PISCOPO, ADMINISTRATOR, v. THE NEW YORK,  
CHICAGO & ST. LOUIS RAILWAY COMPANY.**

Decided, November 27, 1911.

*Wrongful Death—Failure Otherwise than on Merits—Ambiguous  
Phrases in Petition—Admissions in Reviewing Court.*

1. Under Section 11233, General Code, if a plaintiff in an action for wrongful death fails otherwise than upon the merits, he may commence another action upon the same cause of action within one year thereafter.
- 2 When the statements in a petition are ambiguous as to whether a former action was dismissed by the plaintiff or by the court, without prejudice, admissions in brief and oral argument made in a reviewing court that the dismissal was voluntary, will preclude said reviewing court from reversing a judgment on demurrer based upon such meaning of the ambiguous words.

*J. V. Zottarelli, for plaintiff in error.**John H. Clark, contra.*

WINCH, J.; MARVIN, J., and HENRY, J., concur.

Counsel for plaintiff in error gives the history of this case as follows:

“Umberto Giordano, deceased, was run over and instantly killed by the defendant on or about the 28th day of April, A. D. 1907. The plaintiff in error herein was duly appointed and qualified as administrator of said estate and filed against defendant in error, on the 6th day of December, A. D. 1907, his petition in the court of common pleas, said cause being known as No. 115577. *Said action was duly dismissed by said plaintiff in error in open court upon the ground that the petition did not state sufficient material averment to constitute a cause of action.* On the 21st day of September, A. D. 1909, *said plaintiff in error was allowed to dismiss said action without prejudice to a further action.* That a petition by the same plaintiff in error against the same defendant in error, in the same cause of ac-

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tion was filed on the 28th day of October, A. D. 1909, within less than a year from the time of the dismissal of said action. On September 26th, A. D. 1911, the demurrer of defendant in error was sustained, and judgment rendered in favor of defendant in error. On October 7th, 1911, plaintiff in error filed his petition in error in the circuit court."

The demurrer was upon the ground "that the cause of action, if any is stated, is barred by the laws of Ohio."

When the present action was begun, more than two years had elapsed after the death of plaintiff's intestate, and so his right of action was gone unless saved under General Code, Section 11233, formerly Revised Statutes, Section 491, and originally Section 23 of the Code of Civil Procedure, which provides that if the plaintiff fails otherwise than upon the merits of an action commenced by him, and the time limit for the commencement of such action at the date of failure has expired, the plaintiff may commence a new action within one year after such date.

In answer to this, counsel for the railroad company cites a *dictum* of the Supreme Court, found in the case of *Railroad Co. v. Fulton, Admr.*, 59 Ohio State, 575, 577, as follows:

"Much can be said in favor of the proposition that the provisions of Section 4991, Revised Statutes (G. C., 11233), do not apply to a case of this kind. For whilst it may be admitted that the plaintiff failed in the circuit court otherwise than on the merits, still there is much reason and authority for saying that the limitation of two years, fixed for bringing an action for causing death by wrongful act, is a part of the right of action itself, and not merely a limitation of the remedy, and that the action can not therefore in *any* case be brought after the time limit has expired."

As sustaining this doctrine, the court cites *Railway Co. v. Hine*, 25 Ohio State, 629, 634, and says: "as apparently contra, see *Meisse v. McCoy, Admr.*, 17 Ohio State, 225, though the point was not there made. But as we do not dispose of the case on this ground, no further consideration will be given it."

What is now Section 11233 was not before the court in the *Hine* case; it *was* before the court in the *McCoy* case, and said case is in point and applicable here, unless what is said in the *Fulton* case discredits the authority of the *McCoy* case.

Later, however, we find the Supreme Court speaking of the McCoy case with favor. On page 35 of the opinion in the case of *Railway Co. v. Bemis*, 64 Ohio State, 26, Judge Spear says:

“That the code generally is to be liberally construed to promote the ends of justice, and that Section 4991 (now G. C. 11233), is entitled to the same liberal treatment, see *Meisse v. McCoy*, 17 Ohio State, 225,” and other cases cited.

We therefore conclude that Section 11233 authorized the plaintiff to bring this action within a year after the dismissal of his former action, unless, for some other reason, he is forbidden the advantage of said section.

In the case of *Siegfried v. Railroad Co.*, 50 Ohio State, 294, it was held:

“Where an action which has been commenced in due time, is dismissed by the plaintiff after the time limited for the commencement of such action has expired, a new action for the same cause, thereafter commenced, is barred, though commenced within one year after the dismissal of the former action. Such dismissal is not a failure in the action, within the purview of Section 4991 of the Revised Statutes.” (Now G. C., 11233.)

The petition in this case is equivocal. It says that “said action was on the 21st day of September, A. D. 1909, dismissed without prejudice to further action.” Whether it was dismissed by the court or by the plaintiff is uncertain. If by the court, it would be a failure in the action, within the purview of General Code 11233; if by the plaintiff, it would come under the rule laid down in the Siegfried case.

Were it not for the brief of counsel from which we quoted the history of the case and which solemnly states that “said action was duly dismissed by plaintiff in error in open court,” we would apply the rule laid down in *Loudenbeck v. Collins*, 4 Ohio State, 251, and presume that the action was dismissed by the court.

Not only does plaintiff’s brief in this court show that he himself dismissed said action, but his counsel made the same admission orally, and it appears that, from briefs in the files and from

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his admissions in open court, the same statement was made to the court below when it passed upon the demurrer.

The court below, having sustained the demurrer to the petition, should have dismissed the petition, not alone on that ground, but upon the statement of counsel that he had voluntarily dismissed the former petition, and so was barred from filing a new petition because of the ruling in the Siegfried case.

We find no good reason for reversing the judgment herein on the equivocal language of the petition. Counsel has furnished an interpretation of that language, both to the court below and to this court, upon which he must stand. Interpreting it as meaning what he says it means, there was no error in sustaining the demurrer to it, and the judgment therein is affirmed.

#### **APPEAL TO THE COMMON PLEAS IN A CASE INVOLVING EQUITABLE JURISDICTION.**

Circuit Court of Cuyahoga County.

L. S. BING AND SOL R. BING, PARTNERS, v. THE B. & O. R. R. Co.

Decided, January 22, 1912.

*Appeal from Justice—New Cause of Action—Waiver of Objection.*

1. A justice of the peace having no equitable jurisdiction and plaintiff requiring equitable relief in the reformation of a bill of lading before he can recover, on appeal to the common pleas court, though it would have had jurisdiction of the case had it been brought there originally, that court can not entertain jurisdiction unless the parties consent thereto, or waive said objection.
2. A motion by defendant in such an appealed case that the plaintiff be required to separately state and number his causes of action, is an entry of appearance by the defendant, and waives objection to the jurisdiction of the court.

*Max P. Goodman*, for plaintiff in error.

*J. M. and Charles Lessick*, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

Plaintiffs in error brought suit against the railroad company before a justice of the peace for damages for breach of con-

tract to safely carry goods shipped by plaintiff in care of the railroad company.

Judgment being for the plaintiffs, an appeal to the common pleas court was taken by the defendant, and there it became necessary for the plaintiffs to ask that the bill of lading, or contract between the parties, be reformed so as to show that the plaintiffs were the real consignors of the goods, it reading by mistake, or inadvertance, in the name of some other person.

Not being satisfied with the form of plaintiff's amended petition, the defendant filed a motion to require the plaintiff to separately state and number his causes of action, which motion was granted, and plaintiffs complied with the order of the court, filing another amended petition setting up in one cause of action facts showing that the bill of lading did not express the real contract between the parties and asking its reformation, and another cause of action setting out the facts as to the shipment of the goods, payment of charges and damages to the goods in transit.

This amended petition was stricken off on motion of the defendant on the ground that it set up a different cause of action from that sued upon before the justice of the peace, and one of which the justice did not have jurisdiction.

A justice having no equitable jurisdiction, and the plaintiffs requiring equitable relief in the reformation of the bill of lading before they could recover, the common pleas court, though it would have had jurisdiction of the case had it been brought there originally, could not entertain jurisdiction of the case on appeal, unless the parties consented thereto or waived said objection.

This we think they did, the plaintiffs by filing their petitions in the common pleas court, and the defendant by filing its motion to separately state and number, as will appear from an examination of two cases cited by counsel.

On the case of *O'Neal v. Blessing*, 34 O. S., 33, the plaintiff had brought suit for damages by trespass to real estate, beyond the jurisdiction of the justice, and the Supreme Court held that the common pleas court could not take appellate jurisdiction of

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the action, but that where an appeal was attempted and the plaintiff filed a petition and the defendant, without objecting to the jurisdiction, by motion obtained an order of the court requiring the plaintiff to amend his petition and then demurred to the petition as amended, the defendant thereby entered his appearance as in an original action in the court of common pleas.

It is interesting to read what the court says on the subject on pages 36 and 37 of the opinion, for there it appears that the case turned upon the question whether or not the common pleas court had obtained jurisdiction of the *persons* of the parties, not of the *subject-matter*:

"The subject-matter of the action was one over which the court of common pleas had original jurisdiction; and the parties, either by express consent, or by acts which the law regards as equivalent thereto, could submit themselves personally to its jurisdiction. The question is: Did the parties by their acts give the court of common pleas complete original jurisdiction of the action? We think they did. The filing of his petition in the action, by plaintiff, was an act that was subject to no equivocal construction. It was an appearance on his part. To this petition, and also an amended petition filed by leave of the court, the defendant interposed motions raising questions as to the sufficiency of the petitions respectively. \* \* \*

"By the filing of these petitions respectively, and invoking the rulings of the court thereon, the defendant impliedly waived the issuing and service of process, and submitted his person to the jurisdiction of the court in the action. It was, in legal effect, precisely as if the plaintiff had filed his petition and the defendant had expressly waived process and filed his answer.

"The papers on file in the attempted appeal had no force or validity for any purpose, and were, therefore, properly stricken from the files."

In other words, the service made in the justice court does not hold over and bring the parties, by the appeal, into the common pleas court, as it does in appealable actions, but, if the latter court has original jurisdiction of the subject-matter, and service is there had upon the parties, or is waived by them, its jurisdiction is as complete as if there had been no attempt to sue first before a justice of the peace.

In the case of *Long v. Newhouse*, 57 O. S., 348, it was held:

“In order to enable a defendant to object to the jurisdiction of the court over his person, the objection must be made at the earliest opportunity of the party. If before making such objection, the party appears and makes a motion that the plaintiff be required to attach an account of the items of his claim to his petition, or, that he be required to separately state and number his causes of action, or, that he be required to strike certain matter from his petition, in either of these cases, the party voluntarily submits himself to the jurisdiction of the court, and he can not afterwards be heard to object thereto.”

In the light of these cases it seems that the common pleas court's jurisdiction was completed by the defendant's filing its motion requiring the plaintiffs to separately state and number their causes of action, and it was error for the court to thereafter strike the amended petition from the files.

The fact that this was done twice for the same reason, both as to the second amended petition and the third amended petition, makes no difference; the doctrine of *res adjudicata* does not apply to various steps in the same action. The trial judge who struck the third amended petition from the files was not bound to do so simply because it was identical with the second amended petition, which another judge of the same court had stricken off, if the first judge had erred in his ruling. Of course, courtesy between co-ordinate judges and deference as to each other's opinions lead to such results, but there is no law requiring such rulings.

For error in striking the third amended petition from the files, the judgment is reversed and the cause remanded for further proceedings.

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**ACTION FOR DAMAGES FOR THE BRINGING OF A SUIT IN  
MANDAMUS.**

Circuit Court of Cuyahoga County.

CHARLES BRENNER v. F. V. FAULHABER ET AL.

Decided, January 22, 1912.

*Mandamus—Judgment Conclusive as to What—Malicious Prosecution  
of Writ.*

1. A judgment awarding a writ of mandamus is conclusive, in collateral proceedings, as to the truth of the facts stated in the application therefor and of the authority of the attorneys representing the applicants for such writ.
2. An action will not lie for maliciously and without probable cause suing out a writ of mandamus, so long as judgment awarding the writ stands unreversed.

*Geo. A. Groot and H. Preusser, for plaintiff in error.**M. P. Mooney, contra.*

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

This was an action brought by Brenner, who was a justice of the peace, to recover damages from the defendants growing out of their causing ninety-seven proceedings in mandamus to be brought against him, to require him, as such justice, to accept appeal bonds in ninety-seven cases brought before him in which he had rendered judgments in favor of one S. A. Grossner.

Objection by the defendants to the introduction of any evidence under the petition was sustained by the trial court, and the question for review here is whether or not the petition shows a cause of action.

It sets forth that judgment in all the mandamus cases was against the plaintiff and, so far as appears, said judgments are still in force and unreversed.

The plaintiff says that the defendants were not the plaintiffs in said mandamus proceedings, and were not authorized to represent the plaintiffs therein, but "maliciously conspiring to injure plaintiff in his good name and reputation and for the purpose of

causing it to be believed that plaintiff was guilty of malfeasance in his said office as justice of the peace, intending to harass and oppress the plaintiff, falsely and maliciously and without probable cause therefor, caused" said mandamus proceedings to be brought, "using the names of others as plaintiffs therein."

The petition then sets forth the allegations of the applications in mandamus and says that the statements therein contained were false in fact; that one of the defendants, as attorney for the respective plaintiffs, swore to the truth of the allegations in the applications.

It is further alleged that upon these applications in mandamus the defendants induced the common pleas court to issue peremptory writs of mandamus against the plaintiff, without notice to him, and that he was never served with any notice or process to appear or return and answer said writs. Judgment for costs was also rendered in each of said cases against the plaintiff.

So long as the judgments in the mandamus case stand unreversed, there appears to exist no cause of action against the defendants.

The judgments in said actions are conclusive as to the truth of the facts stated in the applications therefor. They are conclusive as to the authority of the defendants to represent the plaintiffs therein.

The question of service in said proceedings upon the plaintiff is not open to question in this collateral proceeding, and, in any event, the court had a right to grant a peremptory writ without notice. General Code, Section 12288.

It does not appear that judgment for costs in said cases was rendered without notice to plaintiff, nor do we find any allegation that defendants in any way prevented plaintiff from having a review of said judgments.

The petition herein does not warrant recovery for the malicious prosecution of a civil action, for there was not any arrest of the person or seizure of property, nor did the proceedings terminate favorably to the plaintiff.

The case of *Pope v. Pollock*, 46 O. S., 367, has been cited as sustaining plaintiff's petition. It holds that an action may be

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maintained for maliciously, and without probable cause instituting and prosecuting an action in forcible entry and detainer. The extraordinary character of that action is set forth, and the decision seems to be bottomed upon the proposition that one action in forcible entry and detainer is not a bar to subsequent actions. It further appears in the case that the plaintiff had prevailed in the forcible entry and detainer case. Here he lost out in the mandamus proceedings.

The provisions of Section 12848, providing that any attorney or counselor at law, who encourages, incites, or stirs up a suit, quarrel or controversy between two or more persons with intent to injure any of such persons, shall be fined not more than \$500, is for the protection of society, but it does not lessen the elements required by the law to be established in making out a case for the malicious prosecution of a civil action, nor does it make any difference that the same attorneys brought ninety-seven suits against the plaintiff, each for different persons, in all of which it appears that plaintiff was justly ordered to do a duty enjoined upon him by statute.

Judgment affirmed.

**INTEREST OF ASSIGNEE OF AN INSURANCE POLICY.**

Court of Appeals for Hamilton County.

**HORACE W. HARMYER v. THE POSTAL LIFE INSURANCE CO.\***

Decided, April 10, 1914.

*Life Insurance—Determination as to the Interest of an Assignee in a Policy of Insurance.*

Under the assignment of a life insurance policy, set out in the opinion, the assignee is entitled to recover out of the proceeds only the amount of his insurable interest.

*Charles C. Kearns and Thos. L. Michie, for plaintiff in error.*  
*Frank H. Kunkel, contra.*

SWING, J.; O. B. JONES, J., and E. H. JONES, J., concur.

This is an action in this court on error to the judgment of the Superior Court of Cincinnati. The action arose out of a policy of insurance issued by the Postal Life Insurance Company on the life of Adolph Schmidt. The life insurance company filed its petition in said court setting forth the policy and stating the amount due on the policy and brought the money into court making Carrie Schmidt, administratrix of Adolph Schmidt, deceased, and Horace W. Harmeyer defendants, alleging that both parties claim the proceeds of said policy.

Harmeyer and Schmidt both filed answers, each claiming to be entitled to the proceeds of said policy, excepting from it the amount paid by said Harmeyer, which was admitted by Mrs. Schmidt as being due to said Harmeyer, having been paid by him on said policy during its continuance.

Plaintiff below pleads that Schmidt took out a policy for \$5,000 on his life, in the Provident Savings Life Assurance Society of New York on the 27th day of April, 1896, and that he continued to pay the annual premiums on same until the

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\*Affirming *Postal Life Insurance Co. v. Harmeyer*, 15 N.P.(N.S.), 476; see also opinion on page 297; writ of *certiorari* applied for and refused by the Supreme Court June 9, 1914

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22d day of April, 1911, when he assigned said policy to Horace W. Harmeyer. The assignment is as follows:

"For value received I hereby assign and transfer unto Horace W. Harmeyer, No. 519 Main street, Room 208, Lincoln Inn Court, in the city of Cincinnati, state of Ohio, Policy of Insurance No. 76,203 issued by the Provident Savings Life Assurance Society of New York upon the life of Adolph F. Schmidt of Cincinnati, Ohio, and duly reinsured in the Postal Life Insurance Company, all dividends, benefits and advantages to be had or derived therefrom, subject to the conditions of the said policy and to the rules and regulations of the company, and subject and subordinate to any indebtedness to the company.

"It is expressly agreed that before any payment shall be made by virtue of this assignment, satisfactory proofs of the insurable interest of the assigned shall be furnished to the company, and the company shall not be liable for any sum in excess of such insurable interest.

"Witness my hand and seal, at Cincinnati, Ohio, this 22nd day of April, 1911.

"(Signed) ADOLPH F. SCHMIDT."

The policy contained this provision:

"Any assignment of this policy must be in writing, and a duplicate thereof must be furnished the society. Any claim arising under an assignment shall be subject to satisfactory proof of insurable interest existing at the death of the insured or at the date of such claim, if prior thereto, and the society shall be liable to the assignee to the extent of that interest only; but the society will not assume any responsibility for the validity of an assignment."

On the back of the policy there was also written, at the same time, the following:

"CINCINNATI, O., April 22d, 1911.

"The consideration for which this agreement was made, having been fully paid and satisfied, I hereby relinquish all right, title and interest in Policy No. 76,203, on the life of Adolph F. Schmidt (and my estate as beneficiary) of Cincinnati, Ohio, as provided by this agreement. That said Horace W. Harmeyer, his heirs, assigns, becomes the beneficiary under said policy No. 76,203.

"Witness my hand and seal on the day and date above mentioned.

"Adolph F. Schmidt, Assignee.

"Signed in the presence of Edward L. Heckel, Witness."

It being a printed form, with that part which is here italicized being inserted in ink on the original document.

As stated, Harmeyer by virtue of this assignment claimed to be the sole beneficiary, whereas Mrs. Schmidt claimed that he was entitled to receive only the amounts paid on said policy together with the interest accruing thereon.

Under these pleadings the case was tried in said court and the following judgment rendered:

"This cause coming on to be heard on the petition of the plaintiff, the answer and cross-petition of the defendant Horace W. Harmeyer, and Carrie Schmidt as administratrix of the estate of Adolph F. Schmidt, deceased, and the evidence, and the court being fully advised in the premises finds that the Provident Savings Life Assurance Society of New York issued a policy of insurance in the sum of five thousand (\$5,000) dollars on the life of Adolph F. Schmidt, and that the plaintiff the Postal Life Insurance Company assumed the payment of said policy; that among other conditions in said policy it was provided that in the event said policy is assigned by the insured, that the company shall be liable to the assignee to the extent of that insurable interest only; that said policy was assigned by the insured to one Horace W. Harmeyer subject to the conditions of said policy, and to the rules and regulations of the company, and it was further agreed in the said assignment that before payment shall be made by virtue of the assignment satisfactory proofs of the insurable interest of the assignee shall be furnished to the company and the company shall not be liable for any sum in excess of such insurable interest.

"The court further find that the plaintiff deposited with the clerk of the court the sum of \$4,533.19 which was the amount due under said policy after deducting an indebtedness of the insured in favor of said company.

"The court further find that the defendant Horace W. Harmeyer refused to furnish the plaintiff any testimony as to his insurable interest in the life of Adolph F. Schmidt, deceased, and that as a matter of fact the said Horace W. Harmeyer had no insurable interest in the life of Adolph F. Schmidt excepting as to the premiums and interest paid by him to the said company after said assignment of said policy by Adolph F. Schmidt to said Horace W. Harmeyer, which said premiums and interest are hereinafter referred to and ordered paid to said Horace W. Harmeyer.

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"The court further finds that because of the conduct of the defendant Horace W. Harmeyer, through correspondence with the Insurance Department of New York and the Post Office Department at Washington, and through other acts whereby the plaintiff was being greatly injured, the said plaintiff was forced and did, as a matter of defense and protection to its interests, and in order to prevent further injury to its business, deposit said money with this court; that the depositing of said money under such circumstances did not constitute a waiver on the part of the company of the provision and terms of the policy providing that the said Horace W. Harmeyer shall establish his insurable interest in the life of Adolph Schmidt.

"The court further find on consideration of the answer and cross-petition of the defendant, Horace W. Harmeyer, that the said defendant Horace W. Harmeyer is not entitled to the entire fund deposited so as aforesaid with the clerk of this court; that the said defendant Horace W. Harmeyer is entitled to the premiums paid by him to said company, to-wit: April 22, 1911, \$88.80; April 27, 1912, \$88.80; April 27, 1913, \$88.80; with interest thereon from said respective dates up to the date of this decree, amounting in all to \$294.53, and the further sum of \$72.75 interest paid by the said Horace W. Harmeyer on the loan of \$485 obtained by Adolph F. Schmidt in his lifetime from the plaintiff with interest thereon to date amounting in all to \$12.15, making a total of \$379.43, which amount the clerk of the court is hereby ordered to pay to said Horace W. Harmeyer or to Thos. L. Michie, his attorney.

"And the court coming now to the consideration of the answer and cross-petition of the defendant, Carrie Schmidt, as administratrix of the estate of Adolph Schmidt, deceased, and the evidence, finds that the plaintiff was at all times and still is willing to pay the difference between the amount so found to be due to said Horace W. Harmeyer and the amount deposited with the clerk of this court to Carrie Schmidt, as administratrix of the estate of Adolph F. Schmidt, deceased, and the court doth now, therefore, order, adjudge and decree that the clerk of this court pay the balance of said fund remaining in his hands amounting to the sum of \$4,153.76 to the said Carrie Schmidt as administratrix of the estate of Adolph F. Schmidt, deceased, or to Frank H. Kunkel, her attorney."

To which decree exception is taken in the following language:

"To the foregoing decree Horace W. Harmeyer, by his counsel, duly excepts, and gives notice of appeal to the Court of

Appeals of Hamilton County, Ohio, and the court hereby fixes the appeal bond at \$1,000."

No motion for new trial was filed, and no bill of exceptions was taken. The case is therefore before this court on the pleadings and the judgment entered.

At the conclusion of the argument in this court, the court announced that the judgment would be affirmed, without stating any reasons for the affirmance.

The legal question presented to us seems so clear that we hardly thought it necessary to consider the case further, or to give any reasons why the judgment should be affirmed.

The motion for re-hearing is now filed, and elaborate arguments have been presented to us, asking that the former judgment be set aside and judgment rendered for the defendant in error.

After giving the matter full consideration, we see no way by which we can reverse our former judgment. The issues were squarely made as to whether Harmeyer was entitled to the whole amount of the policy or whether he was limited to recovering the amount of his insurable interest. We are bound by the judgment that evidence was offered which would fully sustain the finding in favor of Mrs. Schmidt.

Judgment affirmed.

**TRUST COMPANY DIRECTOR LOSES HIS LIEN.**

Circuit Court of Cuyahoga County.

THE CLEVELAND TRUST COMPANY, ASSIGNEE, v.  
E. H. KLAUSTERMEYER.\*

Decided, January 22, 1912.

*Equitable Lien—Agreement for Collateral—Collateral Not Identified or Set Aside.*

A trust company being in failing condition its directors were called together and requested to deposit with the company at least \$5,000 each, it being agreed that if they would do so, each should have collateral security therefor "from the securities then owned by and in the possession of the trust company." Only two of the directors complied with the request, one depositing his money and receiving collateral as security therefor. The other (plaintiff), deposited \$5,000 but neglected to get his collateral at the time and let the matter go until after the failure of the bank a few days later. No particular securities were ever set aside for him; *Held*: He was not entitled to an equitable lien upon all the securities of the trust company which came into the hands of its assignee in insolvency.

*Blandin, Rice & Ginn*, for plaintiff in error.  
*Ford, Snyder & Tilden*, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

This action originated in the Insolvency Court of Cuyahoga County upon an application of Klaustermeyer to have a preference allowed him in the sum of \$5,000 and interest out of the assets of the defunct Euclid Avenue Trust Company, in the hands of the Cleveland Trust Company, its assignee.

The insolvency court disallowed the claim; on appeal to the common pleas court it was allowed, and the judgment of the latter court is here for review on a finding of facts which seems to be sustained by the evidence given on the hearing.

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\*Reversed with opinion, *Klaustermeyer v. Cleveland Trust Co.*, 89 Ohio State, —.

It appears that a few days before it failed a meeting of the directors of the Euclid Avenue Trust Company, of whom Klaustermeyer was one, was held at which it was stated that the national bank through which the trust company cleared would refuse to clear longer for it unless a large sum in cash was raised by the trust company. The directors were requested to raise this money and deposit with the trust company, at least \$5,000 each, it being agreed that if they would do so, each should have collateral security therefor "from the securities then owned by and in the possession of the trust company."

Only two of the directors complied with the request. A director named Oram deposited \$5,000 and received collateral as security therefor. Mr. Klaustermeyer deposited \$5,000 but neglected to get his collateral at the time, being in a hurry, and let the matter go until after the failure of the bank a few days later. No particular securities were ever set aside for him.

On his application to the insolvency court he claimed an equitable lien upon all the securities of the trust company which came into the hands of its assignee.

The doctrine of equitable lien is recognized in Ohio, and is thus stated by Pomeroy in Section 1235 of his third volume on Equity Jurisprudence:

"The doctrine may be stated in its most general form that every executory agreement in writing whereby the contracting party sufficiently indicates an intention of making some particular property, real or personal, or fund, therein described or identified, a security for a debt, or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property. The doctrine itself is clearly an application of the maxim, 'equity regards as done that which ought to be done.' In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the

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property so described, or rendered capable of identification, is to be held, given or transferred as security for the obligation."

This case appears to come within the rule thus stated, except in one particular: the agreement relied upon does not "deal with some particular property, either by identifying it, or by so describing it that it can be identified."

Had the agreement been that Klaustermeyer was to have a lien on *all* the securities then owned by and in the possession of the trust company, the description of the collateral would have been sufficient under the holding of the leading case of *Countess of Mornington v. Keane*, 2 DeGex & J., 292, where the covenant was that all the lands which the covenantor should have on a certain day should be charged, or be security, for a certain debt.

In the case of *Atlantic Trust Company v. The Carbondale Coal Company*, 99 Ia., 234, the agreement was that "all the coal company's accounts for coal sold," should be assigned to the bank.

We have examined all the authorities cited by counsel on both sides, and find that the agreements construed in each case where a lien was sustained were respecting specific property, or all of the covenantor's property of a certain kind or some aliquot portion of it.

The facts in this case show that Klaustermeyer was not to have a lien on all the securities of the trust company, yet that is what he is asking. He was not to have a lien on the securities delivered to Oram, nor was Oram to have a lien upon more than sufficient to secure his own deposit. The offer was made to all the directors at the same time, and they were not to have liens in common and undivided upon the securities of the trust company, but each understood, as Klaustermeyer must have understood, that when each made his deposit, each was to pick out, or have assigned to him, collateral enough in each case to be sufficient security for the amount deposited.

With this view of the facts, the judgment of the common pleas court is erroneous. Nor is it to be sustained upon the theory of a trust, expressed by Judge Phillips, who passed upon this case at one stage in the proceedings as follows:

"Treating this as a loan of money, when Klaustermeyer delivered his five thousand dollars to the bank in pursuance of the

agreement that he was to be secured for his loan of five thousand dollars, and did not then receive his securities but was to call at another time and get them, thereafter the bank held the securities in trust for the benefit of the security of Klaustermeyer. I think that created a trust relation between the bank and Klaustermeyer with reference to these securities, to the extent and effect that he would have therefrom what would secure his loan of five thousand dollars."

This is only stating the theory of an equitable lien in another way and in a way criticised by Pomeroy in Section 1234 of his work already referred to, as follows:

"It (the equitable lien) is sometimes, although I think unnecessarily and even incorrectly, spoken of as a species of implied trust. If any reference to the theory of trust is made, it is more accurate to describe these liens as *analogous to trusts*; for while the two have some similar features, they are unlike in their essential elements.

"The very essence of every real trust—express, resulting or constructive—is the existence of two estates, in the same thing a legal estate vested in the trustee, and an equitable estate held by the beneficiary.

"In an equitable lien there is a legal estate with possession in one person, and a special right over the thing held by another; but then here the resemblance which at most is external, ends. This special right is not an estate of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed against the thing which is subject to the lien. To call this a trust and the owner of the thing a trustee for the lienholder, is a misapplication of terms which have a very distinct and certain meaning.

"It follows, therefore, that in a larger class of executory contracts, express and implied, which the law regards as creating *no property right, nor interest analogous to property, but only a mere personal right* and obligation, equity recognizes, *in addition to the personal obligation*, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien,' which though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing and to enforce the defendant's obligation by a remedy which operates directly upon that thing."

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It has been suggested that Klaustermeyer is entitled to a preference as to his \$5,000 on the theory that the bank received his money after it knew of its own insolvency.

The answer to this is that there is no evidence in the record that the officers of the bank knew it was insolvent when the deposit was made, and if they did, or ought to have known, then Klaustermeyer himself, being a director and conferring with them as to its condition, knew, or ought to have known of its condition.

The judgment being erroneous upon the facts as claimed by defendant in error, it is reversed and judgment is rendered for plaintiff in error.

#### CONTEMPT IN INDUCING JUROR TO VISIT THE PROSECUTING ATTORNEY.

Circuit Court of Cuyahoga County.

J. A. C. GOLNER ET AL. V. STATE OF OHIO.

Decided, January 23, 1912.

*Contempt of Court—Tampering with Juror—Privilege of Counsel.*

1. To entice a juror in a criminal case from his home late at night and by falsehood induce him to put himself in a position which would appear compromising both to him and to the prosecuting attorney, with witnesses placed in such position that they could see the unsuspecting juror and be able to testify to his apparent, but not real, wrong-doing, is an interference with the due administration of justice and a contempt of court, punishable as such.
2. A lawyer is not privileged from testifying in a case against his client, as to a conference between him and his client in which future wrong-doing of his client was discussed.

*P. L. A. Leighley and F. A. Henry, for plaintiff in error.*  
*John A. Cline and W. D. Meals, contra.*

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The plaintiffs in error, in an action in the Court of Common Pleas of Cuyahoga County, in which they were defendants and

the defendant in error was plaintiff, were found guilty of contempt of court. The plaintiffs in error, J. A. C. Golner and Charles Woodward, were each sentenced to serve ninety days in jail, and the plaintiffs in error, Ed. S. Goldstein and Frank Noonan, were each sentenced to serve sixty days in jail, and the costs of prosecution were adjudged against said parties.

A reversal of the judgment of the court of common pleas is sought by the plaintiffs in error. A consideration of the errors assigned requires, first, a determination of the question whether the information, on which the plaintiffs in error were attached and brought to trial, charges facts sufficient to constitute contempt of court. Demurrers to the information were filed on behalf of the various parties charged with contempt, which were overruled, and the overruling of these demurrers is one of the errors assigned.

The information is in the following language:

"Now comes John A. Cline, the duly elected, qualified and acting prosecuting attorney of Cuyahoga county, Ohio, and informs the court as follows, to-wit:

"That at the September term, 1911, of said court, the grand jury of said county and state duly returned to said court an indictment against the defendant, J. A. Golner, duly charging the said defendant Golner with having obtained by false pretenses, certain property belonging to one E. Q. Reeves; that on the 17th day of November, 1911, said indictment was duly filed in said court in the case of the State of Ohio v. J. A. C. Golner et al, being case No. 313 on the criminal docket of said court.

"That the said defendant Golner was duly arraigned and entered a plea of not guilty to said indictment; that thereupon, said case against the said defendant Golner was set for trial at the September term, 1911, of said court, to-wit: on the 27th day of November, 1911; that on the 27th day of November, 1911, a jury was duly summoned, impaneled and sworn in said case; that whereupon, a trial of said case against the defendant Golner was duly had, which trial commenced on the 27th day of November, 1911 and ended on the 11th day of December, 1911, when the jury in said case, as aforesaid, returned a verdict to said court finding the defendant, Golner, guilty as charged in said indictment.

"That John A. Cline, prosecuting attorney as aforesaid, participated as one of counsel for the state in the trial of said case and that one Samuel Glass was duly summoned, impaneled and

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sworn as one of the jurors in said case, and sat as such juror on the trial of said case, as aforesaid.

"That on the 10th day of December, 1911, and while said case against the said defendant Golner was pending and on trial, the said defendants, J. A. C. Golner, Ed. S. Goldstein, Frank Noonan and Charles Woodward, agreed and conspired together with the intent then and there to interfere with, obstruct and defeat the administration of justice in said case; that on the said 10th day of December, 1911, the said defendants, J. A. C. Golner, Ed. S. Goldstein, Frank Noonan and Charles Woodward, in furtherance of said unlawful design, did then and there falsely pretend and represent to the said Samuel Glass, one of the jurors in said case, as aforesaid, that the said John A. Cline, prosecuting attorney and counsel in said case, as aforesaid, wanted to see him, the said Samuel Glass, at his, the said John A. Cline's residence, for the purpose of having a personal interview with him and that the said John A. Cline had sent them to convey him, the said Samuel Glass, by automobile to his, the said John A. Cline's, residence.

"That said representations made by said defendants to the said Samuel Glass, as aforesaid, were all and singular false and untrue, which the said defendants then and there well knew.

"That thereupon, to-wit. on the said 10th day of December, 1911, the said Samuel Glass, believing that said representations made to him by said defendants, as aforesaid, were true, accompanied said defendants in an automobile to the residence of the said John A. Cline, at No. 2276 Murray Hill avenue, S. E., in the city of Cleveland, said county and state.

"That said defendants, J. A. C. Golner and Ed. S. Goldstein, Frank Noonan and Charles Woodward, in furtherance of said conspiracy to obstruct the administration of justice in said case through fraud and deception, procured four men, who were without knowledge of said conspiracy, to be present at or near the said residence of the said John A. Cline, so as to be able to see the said Samuel Glass enter and leave said residence, and give testimony thereof in said case for the purpose of causing a mistrial of said case, or, in the event that a verdict of guilty were returned by the jury in the case, for the purpose of obtaining a new trial thereof.

"That by reason of the premises, as aforesaid, said defendants, J. A. C. Golner, Ed. S. Goldstein, Frank Noonan and Charles Woodward were then and thereby guilty of obstructing the administration of justice, and of contempt of this court, contrary to the statute in such case made and provided.

"JOHN A. CLINE,

*"Prosecuting Attorney."*

Section 12136 of the General Code provides:

"A court or judge at chambers summarily may punish a person guilty of misbehavior in the presence of, or so near the court or judge, as to obstruct the administration of justice."

In Oswald on "Contempt of Court," page 8, it is said:

"To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrepute or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation."

In *Hole v. State*, 55 O. S., 213, it was held that removing a witness from the county of his residence where he was under subpoena to attend upon the trial of a cause pending, with the purpose and effect of preventing his appearance upon the day of trial, was a wrongful act which obstructed the administration of justice, and was a contempt of court.

The information here charged facts constituting a conspiracy on the part of the plaintiffs in error to interfere with and obstruct the administration of justice and a carrying out of that conspiracy. The necessary result of the acts attributed to the plaintiffs in error would be to bring the authority and administration of the law into disrespect and disregard and hamper and cripple the agencies through which it acts. The information, therefore, states facts which constitute a contempt of court.

Another error assigned by the plaintiffs in error makes it necessary to consider the evidence on which the conviction in the court below was based. It is claimed by the plaintiffs in error that the evidence did not establish their guilt as charged in the information, but on the contrary, proved an innocent and laudable course of conduct on their part.

The evidence shows that while the plaintiff in error J. A. C. Golner was on trial in the criminal branch of the Common Pleas Court of Cuyahoga County, charged with obtaining property under false pretenses, he, with the other plaintiffs in error, entered into an arrangement whereby a juror in that case was to be induced by a fictitious message to go to the house of the prosecuting attorney engaged in trying the case on behalf of the state.

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The plan contemplated the presence of witnesses who should see the juror enter the prosecutor's house. The plaintiff in error Charles Woodward, seems to have been the author of this program. Sunday night, December 10, 1911, was the time chosen for its execution. On the evening of that day a meeting was held by the plaintiffs in error at Woodward's office, at which Horace Neff, an attorney at law, was present. Mr. Neff had previously been retained by the plaintiff in error, J. C. A. Golner, in connection, it appears, with the criminal case then on trial, and at this meeting the plan was unfolded and his advice sought on the legality of the transaction. He testifies that in substance his opinion, as given, was that no statute would be violated. Later that evening, the plaintiff in error, Frank Noonan, in an automobile hired for that purpose, and operated by one who had no knowledge of the plan being carried out, went to the house of the juror, told him that Prosecutor Cline wanted to see him on important business, and taking the juror into the car, drove across the city to the home of Mr. Cline, where the juror was directed by Noonan to go to the door and call for the prosecutor. In the meantime the plaintiff in error, Ed. S. Goldstein, in another automobile and accompanied by Mr. Neff and four other men, who knew nothing of what was to happen, until later at least, had driven to the vicinity of Mr. Cline's house and were waiting the arrival of the other car. As soon as the prosecutor came to the door in answer to the call of the juror, all the other parties rapidly disappeared from the neighborhood.

It is claimed by plaintiffs in error that their only purpose in conceiving and executing this affair was to test the juror whom they believed, on reasonable grounds, to be subservient to the prosecuting attorney to such an extent that he would come at any time and to any place that official might summon him, and thereby demonstrate that he was disqualified. They assert that they acted only after they had obtained legal advice, and point to the fact that no use was made in the criminal case of the visit of the juror to the home of Mr. Cline as evidence that no improper motives animated them.

In a case like this the character of the acts of the parties involved, and the apparent purposes to be accomplished, indicate

more accurately the motives of the actors than their own protestations.

The whole scheme as conceived and executed was wrongful, and there is no room for doubt that the parties who engaged in it were well aware of its doubtful character. A juror was enticed from his home late at night and by falsehood induced to put himself in a position which would, on its face, appear compromising both to him and to the prosecuting attorney. Witnesses were placed in such a position that they could see the unsuspecting juror and be able to testify to his apparent, but not real, wrongdoing.

If this elaborate scheme had no other purpose than to demonstrate the juror's subserviency to the prosecutor, it is difficult to see the need of so many witnesses as were engaged for the occasion. The evidence shows that some other motive than the mere testing of the juror, of whose allegiance to the prosecutor they seemed satisfied, was back of their plan.

In our opinion, the conviction was justified by the evidence, unless the court erred in permitting the witness, Horace Neff, to testify against the objection of the plaintiffs in error. It is claimed that Mr. Neff was, at the time of the meeting in Woodward's office, acting as attorney for the plaintiff in error, that he was consulted by them upon this occasion as their legal adviser with respect to the whole transaction, and that he is disqualified from testifying.

Under Section 11493, General Code, an attorney is prevented from testifying concerning a communication made to him by his client in that relation, or his advice to his client.

The principles of law decisive of the question involved in the action of the trial court in permitting Mr. Neff to testify, are thoroughly and learnedly discussed in Volume 4 of Wigmore on Evidence, Section 2298. In this section the author discussing the privilege between client and attorney says:

"It has been agreed from the beginning that the privilege can not avail to protect the client in connecting with the attorney a crime or other evil enterprise; and for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client."

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Again, after discussing the reasons for the rule protecting confidences of persons who have already committed crimes or wrongs, imparted to their attorneys, the author says:

"But these reasons all cease to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. From that point onward, no protection is called for by any of these considerations."

In *Mathews v. Hoagland*, 48 N. J. Eq., 455 (21 Atl., 1054), the rule is stated as follows:

"If the client consults the lawyer with reference to the perpetration of a crime, and they co-operate in effecting it, there is no privilege, for it is no part of an attorney's duty to assist in crime; he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he can not properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of fraud, if it is affected by the co-operation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy which, on its accomplishment by the commission of the overt act, becomes criminal and an indictable offense."

In view of the inherently wrongful enterprise concerning which Mr. Neff was consulted, and his own participation in its execution, the claim of the plaintiffs in error that he was improperly permitted to testify over their objection is not well founded.

Another assignment of error is based on the claim that the punishment is excessive. The punishment in contempt proceedings of this character rests within the discretion of the court. As was said in *Myers v. The State*, 46 O. S., 491: "The discretion here given is a sound, reasonable discretion, and its exercise in a case of this kind is reviewable."

The punishment inflicted by the trial court was undoubtedly severe, but the offense was of such a character as to merit severity, and it can not be said there was any abuse of discretion by the court.

We find no error prejudicial to the plaintiffs in error in any of the matters assigned for error, and the judgment of the court of common pleas is affirmed.

**PURCHASER OF A BULL AFFECTED WITH TUBERCULOSIS  
PERMITTED TO RECOUP HIS DAMAGES.**

Court of Appeals for Mahoning County.

A. M. CARR ET AL V. JOHN S. MILLER.

Decided, March 10, 1914.

*Sales—Representation as to Value—Seller Bound Although Representations May Have Been Innocently Made—Owner of Property in this Case Bound by Representations of Auctioneer.*

When the seller has made representations which were untrue, materially affecting the value of the property sold, for the purpose of inducing the sale, and the purchaser relying thereon made the purchase; in an action to recover the purchase price of the property sold, the purchaser can recoup the damages that he has sustained by reason of such representations, and it is immaterial that they were innocently made.

*Hine, Kennedy & Manchester*, for plaintiffs in error.

*M. C. McNab*, contra.

POLLOCK, J.; METCALFE, J., and NORRIS, J., concur.

The defendant in error, J. S. Miller, brought an action in the court of common pleas of this county against the plaintiffs in error to recover on a promissory note in the sum of \$210.

The defendants below answered alleging that \$170 of the consideration for this note was the purchase price of a bull, which defendants below had purchased from plaintiff below. They allege that they were induced to purchase this animal by the fraudulent representations of plaintiff below, and further that the plaintiff below through his agent, S. B. Parshall, warranted this animal to be sound and all right. They further allege that the representations made by plaintiff below were not true; that at the time of the sale of said animal it then had tuberculosis, which was discovered shortly after the purchase, and that defendants below were required to slaughter said animal; that plaintiff below was notified of its condition the animal tendered back and a demand made that said note be surrendered, which was refused.

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The defendants below ask damages in the amount of the purchase price named in this note, and also damages for the care and keep of this animal in the sum of \$20.

To this answer the plaintiff below replied, admitting that the amount of the consideration in this note claimed was for the purchase price of this animal, and that afterwards the animal was slaughtered by the defendants below, and deny the other allegations of the answer, and also deny any wrongdoing or any liability on the part of the plaintiff below.

The case went to trial on the issues raised between the answer and the reply, resulting in a verdict in favor of plaintiff below. This action is prosecuted to reverse that judgment for errors which it is claimed occurred on the trial of the case.

It appears from the testimony that Miller was the owner of a herd of Jersey cattle; that on November 9, 1911, he offered these cattle for sale at public auction, and that defendants below purchased at this sale the bull mentioned in the pleadings, paying therefor the sum of \$170, and also purchasing another animal; and the note sued on was given for the purchase price of these two animals.

On the 30th and 31st days of October, prior to this sale, Miller, the plaintiff below, caused this herd of cattle to be tested for tuberculosis by S. B. Parshall, a veterinary surgeon. This was done by Miller to induce prospective purchasers to pay a better price for the cattle; he knowing that cattle of this kind will not readily sell unless such a test has been made and the cattle found free from this disease, or the purchaser is given the right after purchase to make the test.

On the morning of the sale, and just before it was opened, Mr. Parshall, under the direction of Mr. Miller, made the announcement that all the cattle had been tested for tuberculosis; that they showed no reaction, and he exhibited the testing sheet, announcing that any one could examine it who wished, and handed it to Mr. Dempsey, the auctioneer.

It is unnecessary to explain what this testing consisted of, or what it meant by "reaction," further than to say that persons engaged in the cattle business would understand that if the test

showed no reaction the animal was free from tuberculosis, but that if it showed reaction it was afflicted with that disease.

This test which Mr. Parshall had made for tuberculosis is regarded by the authorities on that subject as the most accurate test for determining whether cattle are afflicted with tuberculosis, which is known to persons engaged in the cattle business.

Mr. Miller, the seller, and Carr and Campbell, the purchasers, were experienced cattle men and understood that the announcement that the cattle showed no reaction meant that they were free from tuberculosis. Defendants below testified that they would not have purchased this animal except for the representations made by Mr. Parshall, and that relying on these representations they believed the animal to be free from the disease of tuberculosis.

Some time after the sale this animal was removed to the barn of the defendants below, and on January 19, 1912, was again tested by Dr. Frederick, a state official, for tuberculosis, and found to be very badly afflicted with that disease. Defendants below were ordered to quarantine the animal, which they did, and they also notified Mr. Miller of the condition, offering to return the animal. This was declined by Mr. Miller, and some time in March the animal was slaughtered by Dr. Frederick.

The first error complained of is the court's refusing to permit the defendants to amend their answer by making the warranty extend to an announcement made by the auctioneer.

After the introduction of the plaintiff's testimony the defendants called Judge J. B. Kennedy and asked the following question:

"Following the statement made by Mr. Parshall, what, if any, statement was made by Mr. Dempsey as to the test of these cattle for tuberculosis?"

This question was objected to and the objection sustained by the court, and then the defendants below asked leave to amend the answer by interlineation, by inserting the name of Mr. Dempsey, the auctioneer, in addition to Mr. Parshall, as the agent of plaintiff in warranting the cattle; this was refused by the court and excepted to by the defendants. The record shows that the defendants expected the witness to answer as follows:

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"Now, gentlemen, I am going to sell you these cattle. These cattle have been tuberculin-tested by Mr. Parshall, and when you buy them you get a clean bill of health."

We are unable to see why this question was not competent under the allegations of the answer. It would have proven further representations made by the plaintiff below in order to induce purchasers to bid upon these cattle, and should have been admitted without any amendment to the petition, but the defendants below did not except to this ruling; they only asked leave to amend the answer and excepted to the refusal to permit the amendment. This is discretionary with the court, and we do not think the court violated his discretion in refusing to permit the amendment.

The next error complained of is that the court erred in charging in plaintiff's sixth and seventh requests before argument, that in order to constitute fraud, which would be a defense in this case, the defendants must show that the seller knew the representations to be untrue, or had no reasonable grounds for believing them to be true and in repeating the same principle in charge after argument.

The rule given by the court in these two requests, and in the charge, is the rule applicable in an action to recover damages caused by misrepresentations. *Taylor v. Leith*, 26 Ohio St., 428; *Gartner v. Corwine*, 57 Ohio St., 246.

In this case the plaintiff is seeking to recover the consideration for property sold to the defendants, which as the defendants claim, they were induced to purchase on account of the false representations of the plaintiff, and the defendants are only seeking by recoupment to recover in damages the loss which they sustained by reason of this sale made to them.

"When, however, a person claims the benefit of a contract into which he has induced another to enter by means of misrepresentations, however honestly made, the same principles can not be applied. It is then only necessary to prove that the representation was material and substantial, affecting the identity, value or character of the subject matter of the contract, that it was false, that the other party had a right to rely upon it, and that he was induced by it to make the contract, in order

to entitle him to relief either by rescission of the contract or by recoupment in a suit brought to enforce it." *Mulvey v. King*, 39 Ohio St., 494.

This principle was again affirmed by our Supreme Court in the case of *Irwin v. Wilson*, 45 Ohio St., 436.

In the case of *Pierce v. Tiersch*, 40 Ohio St., 172, the Supreme Court in the opinion say:

"In an action against the mortgagor for the purchase money, his right to set up a counter-claim for any excess in price through the vendor's misrepresentations of the extent of the property, would be the same, whether such representations were wilful or innocent."

Miller, the owner of these cattle, caused this tuberculosis test to be made, and the announcement that it was made and that there was no reaction, for the purpose of securing better prices for his cattle at this sale, and the defendants made the purchase because of and relying upon these representations. Both plaintiff and the defendants believed that if there was no reaction in making this test, the cattle were free from this disease.

"Where the seller makes material statements which are untrue, and the purchaser relies thereon in making the purchase, such representations are fraudulent, and it is immaterial that the seller believed them to be true." *Kirkpatrick v. Reeves et al*, 22 N. E., 139.

To the same effect is the case of *Crowe v. Lewin*, 95 N. Y., 423.

The Supreme Court of Michigan, in the case of *Buchanan v. Gould*, 45 Mich., 481 (8 N. W., 73), in the opinion on page 74 say:

"For the purpose of recoupment it is quite immaterial whether as a question of morals Gould was or was not at fault. The right to recoup was not dependent on it. There being in fact a misrepresentation, though made innocently, its deceptive influence was as effective and the consequences to Baughman as serious in respect to actual damage as though it had proceeded from a vicious purpose."

The plaintiff below did not intend any fraud in making the statement of which complaint is made, but by that statement the

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defendants below were induced to purchase this bull and lost the consideration they agreed to pay for it. The plaintiff below is now seeking to recover the consideration for this contract into which defendants below were induced to enter by the representations of plaintiff below.

If this animal was afflicted by this disease at the time of the sale these parties all believed that this test would have disclosed it, if no mistake had been made in making the test.

"An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." *Mowatt v. Wright*, 1 Wendell, 360.

To permit the plaintiff to recover the purchase money for this animal when the sale was induced by his representation, if it was suffering from this disease at the time, would be permitting the plaintiff to profit by his own mistake. When a loss of the value of property must be suffered, a party should not be permitted to escape that loss by recovering the consideration for a sale of the property induced to be made by his representation, which proved to be untrue, even if innocently made.

For error in giving the two requests complained of, and this error in the charge, the judgment of the court below is reversed and remanded for further proceedings according to law. Defendant in error excepts.

**RESTRICTION OF LOTS FOR RESIDENCE PURPOSES ONLY.**

Circuit Court of Cuyahoga County.

**IDA HILLMAN ET AL V. THE BELT & TERMINAL REALTY  
COMPANY ET AL.**

Decided, January 22, 1912.

*Restrictions—General Plan—Notice of—Common Law Dedication of  
Street—Abutter on Undedicated Street—Rights of.*

1. In order to enforce an alleged general plan for the restriction of all the lots in an allotment to use for residence purposes only, it must appear that sales were made with notice of the plan and under an agreement, express or implied, that the plan was to be carried out with respect to the lots sold.
2. A common law dedication of a street is not proved by evidence that the original owner of the premises improved the street and sold lots with reference to it, referring to an unrecorded plat, that the city renamed the street, placed a sign with the new name at a corner of the street, and gas lamps on it, renumbering and cleaning the street.
3. Abutters upon an undedicated street have a right to have it kept open sufficiently for ingress and egress to and from their lots.

*C. N. Sheldon and William Howell, for plaintiffs in error.  
Kline, Tolles & Morley, contra.*

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The plaintiffs are the owners of certain lots located in a subdivision and allotment made about the year 1900 by one C. O. Evarts, located in the city of Cleveland, the plaintiff, Ida Hillman, owning subplot No. 1; the plaintiffs, Henry B. Ricker and Margaret A. Ricker, owning subplot No. 5, and the plaintiffs Charles Olson and Mary Olson, owning subplot No. 7.

The plat of the allotment as laid out by Evarts contained a street designated therein as Du Broy street, running westerly from Woodland Hills avenue through the allotment, and having no outlet at the west end, being what is known as a dead end street. This strip of land was graded, curbed, paved and otherwise improved by Evarts before the lots owned by plaintiffs

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were sold to them or those through whom they acquired title. The plaintiff's lots front on the north side of this street, and were sold with reference thereto.

Since the plaintiffs acquired their lots the defendant, the Belt & Terminal Realty Company, bought all of the lots on the other side of Du Broy street and several on the same side, and in 1910 further obtained from Evarts a conveyance of the land within the borders of said Du Broy street.

The defendant the Cleveland Short Line Railway Company has obtained title from the Belt & Terminal Realty Company, to a portion of these lots, and, it is averred in the amended petition, is about to construct a four track line of steam railroad across the same.

The defendant, J. W. Smith, on July 1, 1908, purchased of the Belt & Terminal Realty Company a part of the lots acquired by it on the southerly side of said Du Broy street, and has erected thereon a brick factory building for the business of sawing, dressing, furnishing and selling stone.

The defendant, W. H. Whitmore, has likewise, under some arrangement, acquired a portion of these lots, and is using them for a place of manufacturing and compounding oils. On the south side of said Du Broy street the defendant, the New York, Chicago & St. Louis Railway Company, has built a switch, which, near the west end of the street, encroaches upon the south side of the street. In front of the premises occupied by the manufacturing business of the defendant Smith, it is upon the sidewalk portion of the street. No part of the traveled portion of the street is interfered with. This switch is used by those having manufacturing concerns on the property embraced in the allotment, and to some extent, at least, has been used by others.

It is claimed by the plaintiffs that at the time Evarts laid out the allotment and sold the lots owned by plaintiffs he restricted all the lots therein to an exclusively residence purpose, and that the defendants and each of them when they acquired their respective portions had notice of this restriction.

It is further claimed by the plaintiffs that Du Broy street became a public street of the city of Cleveland, and that the con-

struction of the switch-track on a portion of said street is an invasion of their rights. They pray in their amended petition that the defendants, and each of them, be perpetually enjoined from making any use of said lots, or any of them, contrary to said restriction, and from operating or using said switch track along said street; and that said defendants may be required by mandatory order to remove from said lots the factory building, engines, machinery, derricks, switch-tracks, and all other structures, objects or buildings thereon that violate in any way said restriction.

It becomes necessary, then, to determine whether the allotment in question is restricted to residence purposes only.

The deeds from Evarts to such of the plaintiffs as acquired title directly from him, and the deeds from Evarts conveying the other lots owned by the respective plaintiffs, contain no such restriction. In no deed conveying any lot in the allotment was there written such a restriction.

It is asserted by the plaintiffs, however, that Evarts after laying out the allotment upon a general plan of improvement, proceeded to sell lots in the subdivision to various persons upon the representation and promises that all of the lots in said allotment should be sold and used for residence purposes only; that sublots 1, 5 and 7 were sold by him to the plaintiffs, or their predecessors in title, upon the express understanding and agreement that they should be used for residence purposes only, and that all the remaining lots in the allotment, all of which were then owned by him, should be sold and used for residence purposes only; that the plaintiffs, in reliance upon said plan and in accordance with said agreement, have improved their respective lots with buildings used exclusively for residence purposes.

It is contended that these promises and representations and the plan of improvement of said street and property, imposed upon all of the lots in the allotment a restriction that they be used only for residence purposes.

That an agreement restricting the use of land may be proved by parol is laid down in Volume 1 of Jones on the Law of Real Property and Conveyancing, Section 744, and the cases cited

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by the author sustain this proposition. In a proper case equity will enforce the observance of parol restrictions. To make such a case there must be present certain elements which are well stated in an article in 6 Harvard Law Review, 280, where the result of the cases is accurately announced in the following language:

“In order that relief may be granted in favor of any one purchaser against another, there must be something more than the mere covenant of each purchaser with the vendor; and also that it must appear that back of this was some general plan relating to all the lands sold, intended for the common advantage of the purchasers, and entering into the consideration of the purchases. It must also appear that the sales were made with notice of this plan and under an agreement, express or implied, that the plan was to be carried out with respect to the lots or to be sold in pursuance of it. Any purchaser of a part of this land with notice of this plan or purpose, is subject in equity to the restrictions imposed for the purpose of carrying it out, and has the benefit of the restriction placed upon others without regard to the order of their conveyances.”

In the case at bar, the evidence relied upon to establish the restriction fails, in our opinion, to measure up to this test, and we hold that the defendants are not restricted in the use of their lots to residence purposes only.

This conclusion necessarily disposes of the other questions in this case, except the right of the defendants to maintain and operate the switch with its encroachments upon Du Broy street.

The plat of the allotment was never recorded. The street was never dedicated to and accepted by the city, unless there was a common law dedication by Evarts and an implied acceptance of the street by the city. The facts relied upon by the plaintiffs in support of this view are the platting of the property by Evarts on the plan produced in evidence, and the sale of lots bounding on the street and referring to the plat, its renaming by the city and placing of a sign bearing its name “Quebec” at the corner of said street where it comes into Woodhill avenue, and by the placing of gas lamps on said street, renumbering the street and cleaning the same.

In *City of Toledo v. Converse et al.*, 21 C. C., 239, affirmed in 66 O. S., 678, part 1 of the syllabus is as follows:

"In order to constitute a completed and valid dedication of land to the public, it must appear that the owner of the land clearly and unequivocally indicated by his words or acts an intention to dedicate the same, and there must also be an acceptance thereof by the public."

In *Railroad Co. v. Village of Roseville*, 76 O. S., 109, it was held:

"To show the establishment of a street by a common law dedication, it is essential to prove clearly that the owner of the land intended to donate it for that use, and to prove also an acceptance.

"An intention by a railroad company to dedicate a street is not clearly shown by proof that a way over its tracks and unenclosed lands had been used for about forty years by the public, when during the entire time the way was maintained by the company, and was used by its patrons and the use by the public was merely permissive.

"An acceptance by a city or village of the dedication of a street can not be shown by proof of user by the public, but it is essential that acts of acceptance by proper officials be shown."

The evidence fails to indicate clearly and unequivocally an intention on the part of Evarts to dedicate this street, and there is no sufficient evidence that the city ever accepted the

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The plaintiffs can not, therefore, complain of the presence of the switch as an obstruction to a public street, but must stand upon the peculiar injury, if any, done to them, in their property rights in said street.

In spite of the fact that the street is not a public one, the plaintiffs are entitled to have it kept open for access to their respective properties, and if such access were interfered with or obstructed, it would be an invasion of their property rights, which, under proper circumstances, would entitle them to an injunction. Such is not the case, however. The entire track is on the opposite side of the street from their property and encroaches only slightly upon the street, where it does at all. The plaintiffs have free and unobstructed access to their respective

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houses over the entire width of the street for the greater part of the way, and over much more than half of the width of the rest of the way.

In *Herzog et al v. Railway Co. et al*, 6 C.C.(N.S.), 527, it was held that injunction would not lie to restrain the laying of a spur track in a public street, and the holding was based on the ground that ingress and egress to and from the property of the plaintiff were not interfered with. This case was affirmed by the Supreme Court, without report, in 74 O. S., 440.

In *Smedes v. Railway*, 16 O. D., 743, it was held:

“Injunction will not lie to restrain the laying of a surface spur track and the erection above it of a single open truss bridge on the opposite side of the street from the plaintiff's property, there being no injury of a special kind peculiar to him and not shared by him in common with other lot owners abutting the streets.”

It was also decided in *Gunnin v. Railway Co.*, 2 N.P.(N.S.), 411, that the laying of a spur-track in the street, as distinguished from a track for general railroad purposes, is not such a diversion of the street from its ordinary uses as to interfere with the private rights of abutting owners, or beyond the power of council to authorize, and that injunction against the laying of such a track will not lie on the petition of an abutting property owner, where it does not appear that any of his rights or property in the street will be materially interfered with, and who having notice of the proposed construction did not file his petition for several months, or until the work was nearly completed.

In view of the conclusion stated, it is unnecessary to consider the effect of the delay of the plaintiffs in beginning this action until this switch track was laid.

The relief sought by the plaintiffs is denied, and the amended petition is dismissed.

**CONSPIRACY TO DEFRAUD AN ABANDONED WIFE.**

Court of Appeals for Carroll County.

**SAMUEL T. IDDINGS AND ALBAN H. ELLIOTT v. ANNA  
M. WHITACRE.**

Decided, December 16, 1913..

*Abandoned Wife—Rights of, as a Creditor of Her Husband—Attack Before the Entering of Judgment for Alimony—Property Fraudulently Transferred in Effort to Defeat Her Claim—Conspirators Compelled to Respond in Damages.*

1. Where I and E conspire with a husband to defraud his wife of her right of alimony and dower in the husband's property, and in pursuance thereof, I, who holds the legal title to the real estate of the husband, in trust, conveyed it to E and he mortgages the real estate for its value to an innocent mortgagee, and gives the husband the proceeds of the mortgage debt to aid him in converting his property into money and leave the state, I and E are liable in damages to the wife for the amount of her judgment for alimony and the present worth of her dower interest, not in excess of the reasonable value of the real estate so transferred.
2. That the wife has not obtained her judgment for alimony at the time of the fraudulent conveyances of the real estate will not defeat the action.

*McDonald & Ogilvie*, for plaintiffs in error.

*H. E. Eckley*, contra.

POLLOCK, J.; METCALPE, J., and NORRIS, J., concur.

The defendant in error brought an action in the court of common pleas of this county against the plaintiffs in error herein, Rachel Iddings and Olive A. Elliott, to recover a judgment for damages, on the grounds that the defendants below entered into a conspiracy with her husband, Harvey B. Whitacre, to cheat and defraud her by converting all his property into money, in order to enable Whitacre to take his money beyond the jurisdiction of the court, and prevent her from recovering alimony and depriving her of her right of dower in her husband's real estate.

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Issue was joined by separate answer of the defendants, a jury was waived and the case went to trial to the court, resulting in a judgment in favor of the plaintiff below against Samuel T. Iddings and Alban H. Elliott, and in favor of Rachel Iddings and Olive A. Elliott. This action is prosecuted to reverse that judgment, on the ground that it is against the weight of the evidence and the law.

The facts in this case, gathered from the testimony introduced below, show that Harvey B. Whitacre, then unmarried, on the 2d day of July, 1906, transferred by general warranty deed to Samuel T. Iddings the real estate described in the petition. That this conveyance was made to avoid the results that might ensue from a threatened action for slander; that at the time the deed was made Iddings executed an agreement, by which he agreed to convey back the real estate upon demand to Whitacre, or his assigns. That at the time of this transaction there was no contemplated contract of marriage existing between the plaintiff below and Harvey B. Whitacre, but that afterwards on November 17, 1908, they were married. This marriage did not prove agreeable, and by March, 1909, the said Whitacre had determined to abandon his wife, and for the purpose of preventing her from subjecting his property to her support or payment of alimony or dower, he determined to convert his property into money, and this purpose was known at that time to the said Samuel T. Iddings. Iddings arranged a meeting between Whitacre, Elliott and himself; at that meeting Whitacre made known his purpose of converting all of his property into money, for the purpose of placing it beyond the reach of his wife, and he solicited Elliott to purchase his farm and take the deed from Iddings direct to himself. Either at this or a subsequent meeting, Whitacre, Iddings and Elliott entered into an arrangement by which Iddings and his wife should transfer by warranty deed the real estate owned by Whitacre to Elliott; that Elliott was to mortgage it for two thousand dollars and pay the money to Whitacre, which was afterwards done. This was done with the intention and purpose of placing the property of Whitacre beyond the reach of his wife, and depriving her of her marital rights in the property of her husband.

The notes and securities owned by Whitacre had some time prior to the making of the deed for the real estate been transferred to Iddings to hold for Whitacre. About the time of these negotiations for the transfer of the real estate these notes and securities were returned to Whitacre for the purpose of converting them into money, the intention of Whitacre to convert the same into money being known to Iddings and Elliott at the time of the transfer of the real estate.

On May 1st, 1909, the plaintiff below commenced her action against her husband, Whitacre, and the defendants below in this action and Bower, the mortgagee of Elliott, to obtain a judgment against her husband for alimony, and to set aside these several conveyances of her husband's property, on the ground that they were made to defraud her. At the bringing of that action she caused an injunction to issue enjoining the collection of the notes and securities, and enjoining the transfer of the real estate. This action went to trial, resulting in a judgment for alimony in the sum of one thousand dollars, and costs, and a decree setting aside the several conveyances, except the mortgage to Bower, which was held valid. She caused an execution to issue and for want of goods and chattels on which to levy, the same was levied upon the real estate described in the petition; she then caused contempt proceedings to be begun against her husband for failure to pay the alimony judgment, but the writ was returned without service having been made upon him, for the reason that he could not be found by the officer attempting to execute the writ.

Proceedings were then had to sell the real estate and apply the proceeds to the payment of the mortgage lien and the judgment for alimony, which resulted in the sale of the property for the sum of twenty-three hundred and twenty dollars, which was about the full value of the property, and less than sufficient to pay the costs, taxes and the mortgage, leaving the judgment for alimony wholly unpaid and unsatisfied.

On the next day after the hearing of the testimony in the alimony proceeding, and before the judgment was announced by the court, Harvey B. Whitacre left the state of Ohio, taking with

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him in money something over three thousand dollars, being all of his property.

The defendant, Samuel T. Iddings, is the husband of Rachel Iddings, who is a sister of Harvey B. Whitacre; the defendant Olive A. Elliott, is the daughter of Whitacre, by former marriage, and the wife of Alban E. Elliott.

A husband, both by common law and the statutes of this state, is required to support his wife. By the statute of this state the husband must support himself, his wife and his minor children, out of his property or by his labor. (General Code, Section 7997.)

Thus, the property of the husband is subject to the support of his wife, except where the rights of *bona fide* creditors intervene, and she can not lawfully be deprived of this interest in her husband's property; she is a creditor of her husband to this extent. The husband owes to his wife the utmost good faith, and it is a fraud upon her for her husband and others to convert his property into money with the intention of depriving her of her right of support and dower in his property. This principle is recognized by our Supreme Court, where the contract of marriage existed (*Ward v. Ward*, 63 Ohio St., 125). If such is the case where the contract only exists, much more should it be the rule where the marriage has taken place.

A judgment for alimony is only the legal means of compelling a husband, who has abandoned his wife, to support her. She is just as much a creditor and just as much entitled to the benefit of his property for her support before a judgment for alimony is entered, as she is afterwards to subject his property to the payment of alimony.

The property of a debtor conveyed in fraud of his creditors, in the hands of a fraudulent grantee, is subject to the payment of the claims of the creditors of the debtor, and where the grantee has placed the property of the debtor beyond the reach of the creditors, he is subject to a personal judgment for the value of the property. This principle is recognized by our Supreme Court in the case of *Donley v. Clark, Adm'r*, 55th Ohio St., 294.

In the case of *Ferguson v. Tillman*, 12th N. W., 389, the court went further and laid down the rule that where the fraudulent

grantee had sold the property of the debtor, he could not be protected for the money or other consideration he may have paid for the transfer of the property to him, as against the creditors of the debtor, but was liable for the full amount of the proceeds of such property. This is on the principle that the fraudulent grantee holds the property in trust for the creditors of his grantor, and as trustee must account for the full amount of the proceeds.

Iddings, the grantee of Whitacre, held the real estate of Whitacre in trust for his wife, so far as her marital rights might require the property. Elliott, when the property was conveyed to him by Iddings, took it charged with the same trust. Following the principle announced in the above case, he must account to Mrs. Whitacre for so much of the proceeds of the mortgage he placed on the property as her marital rights are reasonably worth. Iddings being a joint wrong-doer with Elliott, is jointly liable.

In the case of *Adams v. Page*, 7th Pickering, 541, it was held that an action for conspiracy would lie in favor of a creditor against his debtor and a third person, who by agreement with the debtor, had caused the debtor's property to be attached on a fictitious claim, and deprived the creditor of the payment of his claim on a subsequent attachment of the same property. This was placed on the ground that there was an unlawful act in causing the fictitious attachment to issue, and an injury by depriving the creditor of the property upon which he had placed an attachment.

Again in the case of *Mock v. Danforth*, 31st Am. Dec., 468 (6 Watts, 304), it was held that:

"Where two persons conspire with a third to defraud the latter's creditors, and in pursuance thereof, take an assignment of his property, and aid him in leaving the state, they are liable in an action upon the case to such creditor.

"That the debt of a creditor is not due at the time of the conspiracy is no objection to such action."

It is true that the rule laid down in this latter case has been criticised and not followed in many subsequent decisions. The reason given for not following this, is that the creditor had a

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right to sell his property and receive the purchase money, and that the intention with which it was done could not affect the right to purchase; and further, that the creditors were only general creditors of the debtor, and had no lien or claim on the property, and the loss or injury would be too remote, contingent and uncertain to base an action for damages.

The defendants below and Whitacre conspired to deprive plaintiff of her marital right of support and dower in Whitacre's real property. When her husband had abandoned her, and she was compelled to secure her right of support in a suit for alimony, she sought by all the legal means at her command to subject the real estate conveyed by the defendants in fraud of her right to the payment of her alimony.

But again, by a statute of this state a contract of sale made with intent to hinder, delay or defraud a creditor, shall be void as to the creditor of such debtor, at the suit of the creditor (General Code, Section 11104), when the person to whom such sale was made knew of such fraudulent intent on the part of such debtor prior to his purchase (General Code, Section 11105).

And further, our statute provides that whoever fraudulently makes a conveyance to defeat his creditors is guilty of an offense (General Code, Section 13126). When these plaintiffs in error were conspiring with Whitacre to fraudulently transfer his property, and converted it into money that he might leave the state, taking his money with him, they were conspiring together to do an unlawful act.

"It is the pride of the common law that whenever it recognizes or creates a private right, it gives a remedy for the wilful violation of it. \* \* \* It is a sound principle that where the fraudulent misconduct of a party occasions injury to the private rights of another, he shall be responsible in damages for the same." *Yates v. Joyce*, 11 Johns, 136.

The wife has a right of support both by common law and statute from her husband out of his property or labor, and when the husband abandoned his wife the law enforced this right by granting her alimony out of her husband's property. The plaintiffs in error, knowing that her husband had abandoned the de-

defendant in error, fraudulently conspired with him to convert his property into money, to enable the husband to take all of his property out of the state, and deprive her of her marital rights in his property.

Defendant in error sought to subject the real estate of her husband to the payment of her judgment for alimony, and was prevented by the fraudulent transfers of the property made by the plaintiffs in error. By reason of their fraudulent misconduct the wife has lost her rights in her husband's property, and plaintiffs in error are responsible in damages to her to the amount of the loss occasioned by their misconduct.

The defendant in error, Anna M. Whitacre, filed a cross-petition against Rachel Iddings and Olive A. Elliott, asking that the judgment below in favor of them be reversed. It is sufficient to say that no act of conspiracy is shown on their part. No doubt they know of the reasons for these conveyances, but they seemed to have taken no part in the transaction, except that Mrs. Iddings joined in the deed with her husband to Elliott, and Mrs. Elliott in the mortgage with her husband to Bower.

The judgment of the court below is affirmed.

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**CONDUCT AMOUNTING TO DISCONTINUANCE OF CAUSE**

Circuit Court of Cuyahoga County.

FRANK LYONS v. C. C. McMAHON, CONSTABLE, ET AL.

Decided, January 22, 1912.

*Justice of the Peace—Failure to Call Case Within One Hour of Time Set for Hearing—Discontinuance.*

If the defendant in a justice court action appears at the time mentioned in the summons, and remains for an hour thereafter, and the plaintiff does not appear, whereupon the defendant departs without any action having been taken in the case, the result is a discontinuance of the case, and the justice has no jurisdiction, at some later day, to enter judgment against the defendant.

*P. P. Beers and Harry Payer, for plaintiff in error.**Stearns, Chamberlain & Royan, contra.*

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

On August 17, 1911, James Thompson & Bro., a corporation, one of the defendants in this action, began suit against Frank Lyons, the plaintiff here, in the court of William H. Chapman, a justice of the peace in and for Cleveland township, to recover the balance claimed to be due on an account for goods sold and delivered. Summons was duly issued and served upon the defendant in said suit, requiring him to appear at the city hall at the office of said justice of the peace on the 16th day of August, 1911, at 8:30 o'clock A. M., to answer to said suit.

On the day, and at about the hour mentioned in the summons, Lyons went to the office of the justice of the peace, which was not open at the time he arrived, but which was opened a few minutes after 9 o'clock. He had with him the copy of the summons served upon him, which he showed to the clerk; of whom he asked information concerning the case. The clerk, after searching through his files and failing to find any file envelope or other record of the case, and after speaking to the justice himself about it, informed Lyons, in substance, that there seemed to be no such case there against him. Lyons remained in

the court room until after 10 o'clock and during the time he was there no one appeared for the plaintiff, and the case was not called.

The evidence is undisputed that on the 14th of August, two days before the time mentioned in the summons for the defendant to appear, the attorney for the plaintiff in the action had requested a young man, who was acting as assistant to the clerk in the justice's office, to continue the case to September 6th, 1911, and that in compliance with this request, there was written on the file envelope thereof a notation to the effect: "Continued by consent to Sept. 6, 1911, 9:30 A. M."

It appears from the transcript of the justice's record that on September 6th, 1911, at 9:30 A. M., the case was called, and the defendant not appearing, judgment for \$291.81 and costs was entered against him.

Lyons had no knowledge of the rendition of judgment against him until C. C. McMahon, a constable, the other defendant in this action, acting under an execution issued thereon, levied on his personal property and put a keeper in his place of business.

In this action, which is here on appeal, the plaintiff seeks to have the judgment rendered against him in the justice court declared void and of no effect and the defendants herein perpetually enjoined from enforcing the same.

Section 10246 of the General Code, relating to actions before justices of the peace, provides as follows:

"The parties are entitled to one hour after the time mentioned in the summons for appearance in which to appear, but are not bound to remain longer than that time unless both parties have appeared and the justice, being present, is engaged in the trial of another cause. In such case he may postpone the time of appearance until the close of such trial."

If the defendant in a justice court action, then, appears at the time mentioned in the summons, and remains for an hour thereafter, and the plaintiff does not appear and the defendant departs without any action having been taken, the result is a discontinuance of the case, and the justice of the peace has no jurisdiction to enter judgment against the defendant at some later date.

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This is the situation presented in the case at bar. The plaintiff, Lyons, complied with the terms of the statutes, and the judgment rendered against him on September 6, 1911, was rendered without jurisdiction over his person and was absolutely void.

The attempted continuance from the hour mentioned in the summons on August 16th, 1911, to September 6, 1911, was of no effect. It was not granted on application to the justice of the peace himself, but by one who had no official standing of any kind, nor was it made by consent, as the file envelope and the transcript of the record, uncontradicted, would indicate. While the attempted continuance was undoubtedly made without any intention of deceiving the defendant or of taking any advantage of him, it was done without his knowledge and resulted in a judgment being rendered against him without any opportunity of making a defense.

When Lyons first discovered that a judgment had been rendered against him, the statutory time for taking an appeal had passed, and he was also unable to take advantage of the provisions of Section 10377 of the General Code providing a method of setting aside judgments irregularly rendered before a justice of the peace, because of lapse of time. There was no other remedy at law to avoid the effect of the judgment, and having pleaded in his amended petition herein that he has a valid defense to the action in which the judgment was rendered, and sustaining this allegation by proof, he is entitled to the equitable relief which he seeks, and a decree is accordingly granted in accordance with the prayer of his amended petition.

**OBIGATION TO MINE COAL NOT RELIEVED AGAINST BY  
BURNING OF THE APPLIANCES.**

Court of Appeals for Mahoning County.

**THE MORRIS COAL COMPANY V. JOHN A. THOMPSON ET AL.**

Decided, December Term, 1913.

*Action to Recover Royalties on Unmined Coal—Work Stopped by Fire—Amount of Coal Remaining Not Sufficient to Warrant Expense of Replacements—Lessee Held for Royalties on Coal Remaining in the Ground.*

When a party by his own contract creates a duty or a charge upon himself, he is bound to make it good, if he may, notwithstanding any agreement by inevitable necessity, because he might have provided against it by his own contract. Hence, where a coal mining company, owning and operating in mining coal, divers and sundry structures, including shaft, tippie, scales, tracks, and all other necessary machinery and appliances on lands adjoining those of the lessor, enters into a contract of lease with the lessor whereby it purchases and agrees to mine all the minable coal underlying lessor's farm of 366 acres, and agrees to pay ten cents royalty for each 2,000 pounds, and after six months to pay said lessor an aggregate royalty of not less than \$4,000 until all the said minable coal has been removed or paid for, and after 150 acres of said demised coal has been mined and paid for, the tippie and appliances by means of which said coal was mined and was intended to be mined were destroyed by fire without fault of said lessee, and it would be unprofitable for the said lessee to reconstruct the same for the purpose of mining the amount of coal remaining in said mine on said land, and said lessee had intended to mine said coal through said existing shaft and tippie and had not otherwise provided therefor.

**Held:** That there was no implied condition that the destruction of said tippie and appliances without fault of the lessee should relieve it from the obligations of said contract, but that it was still bound to mine the minable coal underlying said premises until the same was mined or removed or pay the premium royalty provided for in said lease.

*Tolles, Rosemond, Bell & Dugan, for plaintiff in error.*

*R. F. Scott, contra.*

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## STATEMENT.

Plaintiff in error seeks to reverse a judgment of the court of common pleas in favor of the defendants in error rendered on a lease for the sale of coal. The petition of the plaintiffs below sets up that on the 10th day of November, 1903, they leased, let and granted to the predecessors of the defendant below all the minable coal commonly known as No. 7 vein, four feet or over thick, underlying certain premises which are described as containing 336 acres more or less; that by the terms of the lease the lessee was to begin mining said coal within six months from the date of the same, and from thence forward to diligently prosecute the mining without discrimination or unfairness, until all the minable coal in said premises should be mined, and to pay for each two thousand pounds of coal the sum of ten cents, payable monthly; that after the expiration of said six months they should pay said lessors an aggregate royalty amounting to not less than four thousand dollars, and to continue to pay said royalties until all said coal had been removed or paid for; that the lessee continued to mine said coal until the 10th day of May, 1910, when they ceased and since which time they have refused to pay plaintiff any sum whatever, and they ask to recover such royalty at four thousand dollars per year.

A copy of the lease is attached to the petition containing several provisions not necessary to state except perhaps a provision that if the territory was exhausted to such an extent that forty thousand tons of coal could not be mined and removed in one year by reason of "horsebacks" or the thinness of coal, so that it would be impossible to produce forty thousand tons by diligent operation, the lessee should be charged royalty only upon the tonnage actually produced.

To this petition an amended answer is filed, setting up that at the time of making the agreement mentioned in the petition, the defendant owned and operated a coal mine known as King's mine; that it owned divers and sundry structures used in connection with the operation of said mine, including shaft, tippie, hoists, screens, scales, tracks and other machinery and appli-

ances; that this shaft and tipple and appliances were situated upon land adjoining the plaintiff's land mentioned in the petition and about one thousand feet distant from said lands; that these appliances had cost about forty-six thousand dollars, which was the reasonable value thereof; that after making said agreement the same was improved until plaintiff had invested in said shaft, tipple and equipment about sixty thousand dollars; that beginning at the time mentioned in said agreement and continuing diligently and continually thereafter until the destruction of said tipple and appliances, defendant did without discrimination or unfairness, mine and remove about one hundred and fifty acres of the coal demised by plaintiff as aforesaid, being about four hundred and fifty thousand tons of lump coal; that in said agreement no surface was demised, let or granted to defendant, nor was any right or privilege to use plaintiff's land surface, or any part thereof; that the royalty paid, ten cents per ton of lump coal, was in excess of the rate theretofore paid for mining from said vein; that on the 7th day of February, 1910, without the fault of defendant and against its will, the whole of said plant above ground was destroyed by fire; that thenceforth it was impossible for the defendant to mine and produce the coal then remaining unmined in plaintiff's land; that the said property has not been replaced or restored; that because of said destruction and for no other reason, defendant quit said mine and since said time has not operated the same or any part thereof, and defendant at once removed its property from and surrendered possession of said premises to the plaintiff and wholly abandoned the same; that the reasonable cost of replacing said destroyed plant, or of building the equivalent thereof would greatly exceed the reasonable and ordinary profit which could or would be made from mining and producing such minable and unmined coal as underlying plaintiff's said lands, and would exceed the total amount of royalty payable to plaintiff at the rate of four thousand dollars per annum during the term or years reasonably and ordinarily required for the mining of the minable coal demised as aforesaid by the plaintiff.

To this answer a demurrer was filed by the plaintiff which was sustained, and the defendant not desiring to plead further,

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judgment was rendered on the pleadings in favor of plaintiff. The points claimed by the plaintiff in error in these pleadings, as stated by brief of counsel, are as follows:

1. Plant on outside built and in use before and when contract was made more than nine years ago.

2. More than 1,200 acres opened up by entries and underground working before contract made.

3. The plant destroyed was and has been the only existing plant or approaches whereby Thompsons' coal could be reached.

4. No surface right for a new mine opening or for erecting plant is given by the contract, and there is no mining plant anywhere on Thompsons' land. In other words, the plant can not be replaced there.

5. Plaintiff in error had explored this territory and all adjacent territory, before the fire, and had destroyed all the accessible coal.

6. What remained unmined, owned by Thompsons and others, is not sufficient to warrant restoration of plant.

7. The ten cent royalty was dictated because defendant in error intended, and plaintiff in error expected to and could reach Thompsons' coal without outlay for plant or entries; in other words, through the means at hand when the contract was made. In any other view it was excessive.

8. The allegation of impossibility as a fact.

9. The mutual intention to mine and produce Thompsons' coal through and by means of said plant and not otherwise.

10. That plaintiff in error has abandoned the coal granted and has not retained possession.

#### OPINION.

NORRIS, J.; METCALFE, J., and POLLOCK, J., concur.

It is claimed by plaintiff in error that from the facts stated in the pleadings there was an implied condition that the coal in the land of the plaintiff below was to be mined through and by means of the shaft and tipple then in operation on the adjoining land theretofore constructed by defendant below, and that because of the destruction by fire of the tipple and appli-

ances without the fault of the coal company, it was no longer under obligations to carry out the agreement and mine the coal; that the parties when they made the contract had this situation in view, and that by reason thereof this implied condition arises, and that the performance of the contract on the part of the coal company, while not impossible, this implied condition relieves it from liability.

The substance of this answer is that it would be unprofitable for the coal company to reconstruct the tibble and appliances destroyed by fire to remove the small amount of coal still remaining in the land of the plaintiff below.

There are numerous authorities holding that where the subject-matter of the contract is destroyed without fault of the parties so that the contract is impossible of performance, there is an implied condition that the parties are relieved from carrying out the contract. The earliest case that we have found where the question is discussed is perhaps *Paradine v. Jane*, 1 *Alleyu Reports*, 26, and also reported in 82 *English Reports Reprint*, page 897, a very early English case, but the rule stated is reaffirmed in the case of *Atkinson v. Ritchie*, 10 *East*, 533, reported in Vol. 133, *English Reports Reprint*, 877, and the rule as stated by Lord Ellenborough is as follows:

“When a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.”

That rule is followed in numerous English cases, among others, *Sheffield Water Works Company v. Carter*, 82 *B. D.*, 645, and in this country there are many cases discussing the rule. In *Krause v. Board of Trustees*, 70 *N. E.*, 264, the Supreme Court of Indiana review the authorities at length. That was a case where a contractor agreed to construct an annex to a building and before the completion of his contract the building itself was destroyed by fire caused by lightning, and the Supreme Court of Indiana held that he was not liable for failure to perform his contract, and they announce this principle in the opinion of the court:

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"As to a general covenant, it is the law that the destruction of the subject matter of the contract, thereby creating a physical or natural impossibility inherent in the nature of the thing to be performed, whether occasioned by *vis major* or otherwise, will discharge the covenant, provided the event occurred without fault of the covenantor."

And they cite numerous authorities in support of that principle and among others, the case of *Butterfield v. Byron*, 27 N. E., 667 (12 L. R. A., 571; 25 Am. State Rep., 654), and the Supreme Court cites with approval the principle we have quoted above from *Paradine v. Jane*. Another leading case is *Middlesex Water Company v. Knappman Whiting Company*, 81 Am. State Rep., 467, decided by the Supreme Court of New Jersey, and quoting from the syllabus:

"Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, and if, by unforeseen accident the performance is prevented, he must pay damages for not doing it, no distinction being made between accidents that could be foreseen when the contract was entered into, and those that could not have been foreseen.

"The performance of an express contract is excused where the continued existence of something essential to the performance is an implied condition in the contract."

The learned court in its opinion again refers to the case of *Paradine v. Jane*, *supra*, as the "leading case on the subject," and cite the opinion of the Supreme Court of New Jersey in the case of *Superintendent v. Bennett*, 27 New Jersey Laws, 513 (72 Am. Dec., 373), as follows:

"No rule of law is more firmly established by a long chain of decisions than this—that where a party by his own contract, creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore if a lessee covenant to repair a house, though it be burned by lightning or thrown down by enemies, yet he is bound to repair it. \* \* \* No matter how harsh and apparently unjust in its operation the rule may occasionally be, it can not be denied that it has its foundation in good sense and inflexible honesty. He that agrees to do an act should do it

unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, the law leaves it where the agreement of the parties has put it. The law will not insert, for the benefit of one of the parties, by construction, an exception, which the parties have not, either by design or neglect, inserted in their engagement."

The learned judge refers to the opinion in *Paradine v. Jane*, *supra*, and says that the rule in this case has been adhered to with great tenacity. See also *Bacon v. Cobb*, 45 Ill., 47. The case of *Dermott v. Jones*, 2 Wall., 1, is also cited. In the opinion in that case Mr. Justice Swayne says:

"It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him."

To the general rule, it is stated, there are three exceptions, as follows:

1. Where the subsequent impossibility is imposed by law.
2. Where the continued existence of something essential to the performance is an implied condition of the contract.
3. In contracts for personal services, in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness.

The only exception that could possibly apply here is probably the second, as to where the continued existence of something essential is an implied condition to the contract. It is stated that that is illustrated in the case of *Taylor v. Caldwell*, 3 Best & S., 826 (6 Eng. R. C., 603). The defendant in that case agreed to let certain gardens and a music hall to the plaintiffs for four specified days to come for the purpose of giving a series of concerts. After the agreement was entered into and before the day arrived for the first concert, the music hall was accidentally destroyed by fire. It was held that as the existence of the hall was necessary for the performance of the contract, the defend-

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ants were excused from liability in respect to its performance, and that no action would lie against them.

We think there is a clear distinction between that class of cases and the one at bar. The coal mine itself was not destroyed. The only destruction was of the tippie and appliances by which the coal had therefore been mined, which rendered the further mining of the coal much more expensive. *Dexter v. Norton*, 47 N. Y., 62 (7 Am. Rep., 415), cited by counsel for plaintiff in error in this case is referred to in the learned opinion as to the third class of exceptions above referred to, but it was held in a subsequent case in the same court in an opinion delivered by the same judge that under contract within a specified time, the destruction by fire of the plaintiff's rolling mill, which prevented the defendant from completing its contract by the time fixed in the agreement, did not excuse even though the accident prevented the performance. *Booth v. Rolling Mill Co.*, 60 N. Y., 487.

We find no case that we think conflicts with the principle announced by the authorities cited, but we think whatever may be the law elsewhere, it has been settled by our own Supreme Court against the contention of the plaintiff in error. In the case of *Board of Education v. Townsend*, 63 Ohio St., 514, it is stated in the syllabus:

"Inevitable accident will not excuse the performance of a contract where its essential purposes are still capable of substantial accomplishment, though literal performance has become physically impossible.

"When a party has one or the other of two modes of performing a contract, and one of them becomes impossible by the act of God, he is bound to perform it in the other mode."

It does not appear in this case in the pleadings that literal performance of the contract was impossible. The only claim on the part of the plaintiff in error is that it would be very expensive, and that the coal remaining in these lands could not be mined with profit in view of the expense of reconstructing the tippie. We know of no authority, and none has been cited to us, that relieves a party from the obligations of a contract because of an inevitable accident which makes the performance of

a contract unprofitable. If such a rule were to be adopted where would it end? The coal company in this case had a tippie on adjoining lands in such proximity to the coal of the plaintiff below that it could profitably mine the coal and pay a greater royalty than it otherwise could have profitably paid. Now, its appliances have been destroyed without its fault and the continued mining of Thompson's coal has been rendered unprofitable. May it thereby be relieved from the obligations of its contract? Is there an implied condition in all contracts that the things existing at the time the contract is made, and that the means by which the contract is to be performed shall continue until the performance of the contract? A homely illustration might be suggested that a party had agreed to haul this coal to market; that he had for that purpose a team of horses and a wagon, and, that before the complete performance of the contract without his fault these means are destroyed, and to get another team and wagon for the purpose of hauling the balance of the coal to market would make it unprofitable. Is he still liable on the contract? We think all the authorities say that the liability still exists. *Coal Co. v. Coal Co.*, 86 Ohio St., 140, is a much stronger case for relief from liability than the one made by the plaintiff in error, but the Supreme Court in an exhaustive opinion holds that the lessee is not relieved from liability under the contract of lease.

We have examined all the authorities cited by plaintiff in error and have found none that we think conflict with the rules we have here announced. It follows that the judgment of the court of common pleas will be affirmed.

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**FALSE STATEMENTS IN APPLICATIONS FOR FRATERNAL INSURANCE.**

Court of Appeals for Cuyahoga County.

**SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD  
V. BRIDGET GALLAGHER.**

Decided, June 14, 1913.

*Fraternal Insurance—False Designation of a Dependent as Beneficiary  
—Renders Policy Wholly Invalid—No Recovery May be Had There-  
on by Blood Relatives.*

Where the provisions of the constitution of a fraternal beneficiary organization are by force of statutory law imported into and become an integral part of contracts of insurance issued in accordance therewith, and one of these provisions makes of no effect a certificate of insurance based upon an application which contains a false statement, the naming by the insured as his beneficiary of one falsely designated as a dependent renders the policy wholly void and of no effect *ab initio*; and an action by the mother of the insured, brought after his death on a policy so issued, can not be maintained, and all sums paid by the insured in procuring and maintaining such insurance are forfeited and lapse into the fund provided for such contingencies by the laws of the order.

*White, Johnson & Cannon*, for plaintiff in error.

*E. P. Strong and Carl P. Schuler*, contra.

GRANT, J.; WINCH, J., and MEALS, J., concur.

Error to the court of common pleas.

The prayer of the petition in error in this cause is for a reversal of the judgment of the court of common pleas of this county in favor of the defendant in error, plaintiff below.

Although as to position the parties here are in the reverse order of that held by them in the trial court, we shall hereafter, for the sake of clearness, designate them as they were there in this respect.

For substance, the allegations of error in the petition are included in the first, namely, that no evidence should have gone

to the jury at all, and that upon the pleadings and admitted facts there should have been no recovery by the plaintiff.

Those facts, so far as they are material here, are as follows:

The defendant is a fraternal beneficiary organization, incorporated under the laws of Nebraska. It has no capital stock, and its activities are exerted wholly for the mutual benefit of its members and their families. It is a corporation not for profit, and it has a lodge system; it proceeds under certain ritualistic forms and its mode of government is representative. It has a fund out of which benefits may be paid to the beneficiaries of such of its deceased members as have complied with the conditions imposed by its constitution, rules regulations and laws.

In evidence of the right to participate in the benefits mentioned, the organization issues certificates entitling those beneficiaries who come within their provisions to recover their proper amounts. The application for the benefit insurance in each case, and also the constitution and laws of the order, become and are a part of the contract evidenced by the certificate.

The following parts of the constitution and laws referred to are essential to an understanding of this case:

"Section 3. The objects of the order shall be to combine white male persons of sound bodily health, exemplary habits and good moral character, between the ages of eighteen and fifty-two years, into a secret, fraternal, beneficiary and benevolent order; provide funds for their relief; comfort the sick and cheer the unfortunate by attentive ministrations in time of sorrow and distress; promote fraternal love and unity, create a fund from which, on reasonable and satisfactory proof of death of a beneficiary member, who has complied with all the requirements of the order, there shall be paid a sum not to exceed three thousand dollars (\$3,000) *to the person or persons named in his certificate as beneficiary or beneficiaries, which beneficiary or beneficiaries shall be his wife, children, adopted children, parents brothers, sisters or other blood relations, or to persons dependent upon the member.*

"*The name or names of the beneficiary or beneficiaries shall be written in every beneficiary certificate issued. In case such benefits are payable to one of the relations named herein, who shall, at the time of the death of a member, be also deceased and new designation has been made as hereinafter provided during life, the benefits shall be due and payable to the member's next*

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living relation in the order named in this section; if there be no such relative surviving, then said benefits shall be forfeited to and remain in the beneficiary fund."

Section 60 of the Constitution provides:

"Section 60. The following conditions shall be made a part of every beneficiary certificate and shall be binding on both member and order:

"First. This certificate is issued in consideration of the representations, warranties and agreements made by the person named herein in his application to become a member, and in consideration of the payment made when introduced in prescribed form. \* \* \*

"Fourth. \* \* \* If any of the statements or declarations in the application for membership and upon the faith of which this certificate was issued, shall be found in any respect untrue, this certificate shall be null and void and of no effect, and all moneys which shall have been paid and all rights and benefits which have accrued on account of this certificate shall be absolutely forfeited without notice or service."

Section 66 of the constitution provides among other things:

"If the statements or declarations in his application for membership shall be in any respect untrue, his certificate shall be null and void and of no effect, and all money which shall have been paid, and all rights and benefits which may have accrued on account of his certificate shall be absolutely forfeited without notice or service."

Section 69 provides:

"No officer, employee, or agent of the sovereign camp, or of any camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this constitution or these laws. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the constitution and laws, then in force or thereafter enacted."

The certificate sued upon in this action was issued to Patrick F. McGinty. The named beneficiary in it was James F. Gaul. The relationship of the latter to the insurance sought to be affected is stated in McGinty's application, as follows:

"I hereby direct that the amount of the beneficiary fund, to which my beneficiaries may be entitled at my death, shall be paid to James F. Gaul, related to me as dependent. If said beneficiary should not survive me, same shall be paid to my nearest surviving relative in the order named in the constitution and laws of the order."

The application also contained the following language:

"I hereby consent and agree that this application, consisting of two pages, *to each of which I have attached my signature*, the examining physician's report and all the provisions of the constitution and laws of the order, now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by the Sovereign Camp of the Woodmen of the World, whether printed or referred to therein or not.

"I hereby waive the attaching of copies thereof to said certificate; and I further waive the provisions of all statutory laws and court decisions in relation thereto. \* \* \* I hereby certify, agree and warrant that all the statements, representations and answers made by me in this application, consisting of two pages as aforesaid, are full, complete and true, whether written by my own hand or not; and I agree that any untrue statements or answers made by me in this application \* \* \* intentional or otherwise \* \* \* or if I fail to comply with the laws, rules and usages of the order, now in force or hereafter adopted, my beneficiary certificate shall become void and all rights of any person or persons thereunder, shall be forfeited."

This application is signed by McGinty at the foot of each page.

The certificate issued on this application states:

"This certificate is issued and accepted subject to all of the conditions on the back hereof and subject to all of the laws, rules and regulations of this Fraternity now in force or that may hereafter be enacted, and shall be null and void if said sovereign does not comply with all of the laws, rules and regulations of the Sovereign Camp of the Woodmen of the World, that are now in force or which may hereafter be enacted, and with the by-laws of the camp of which he is a member."

To this certificate is attached this statement:

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"I read the above certificate No. 21056 of the Sovereign Camp of the Woodmen of the World, *and the conditions therein*, and hereby agree to and accept the same as a member of Camp No. 42, state of Ohio, this 22d day of October, 1906, and warrant that I am in good health at this time and that all the requirements of Section 58 of the constitution and laws of the order have been complied with."

This is signed by Mr. McGinty, and witnessed by the Clerk of the Camp. On the back of this certificate is the following:

"CONDITIONS REFERRED TO AND MADE A PART OF THIS CERTIFICATE.

"1st. This certificate is issued in consideration of the representations, agreements and warranties made by the person named herein, in his application to become a member; \* \* \*

"The foregoing provisions are hereby made a part of the consideration for and are conditions precedent to the payment of benefits under this certificate. \* \* \*

"If any of the statements or declarations in the application for membership and upon the faith of which this certificate was issued, shall be found in any respect untrue, this certificate shall be null and void and of no effect, and all moneys which shall have been paid, and all rights and benefits which have occurred on account of this certificate shall be absolutely forfeited without notice or service."

Gaul, the person named in the application and also in the certificate issued upon it, was not a dependent and the statement to that effect was false. The plaintiff, Bridget Gallagher, is, literally, a stranger-in-law to the contract she sues on—her name appearing nowhere in it, either as a party to it or as a designated person to share in its benefits.

The claim of the plaintiff is that notwithstanding this, she being the mother of McGinty may recover upon the certificate, McGinty being now dead.

On the contrary, the defendant contends that the false statement avoids the obligations of the certificate, defeats all right of recovery upon it, and causes the amount that would otherwise be coming to a proper beneficiary, and all sums paid in procuring and maintaining the insurance, to be forfeited and to lapse into the fund provided for such contingencies by the laws of the order.

The foregoing facts and the statement of the issue between the parties are not disputed.

Over the objection of the defendant, testimony was permitted to be introduced and the case was submitted to the jury by the trial court. A verdict for the plaintiff was had for the full amount of the benefit named in the certificate, with interest, and a motion for a new trial being overruled, judgment was entered accordingly.

The same issue that was before the court below is before us. If the contention of the defendant was right, there was no case to go to the jury and it should not have been submitted to the jury at all.

With some reluctance, but in the fulfilment of our duty, we have concluded that the law of Ohio has been sufficiently declared to settle this question and that it does settle it, and that we may not in this case depart from the somewhat narrow and rigid path marked out for us.

This conclusion renders it unnecessary for us to examine the formidable array of authorities, so industriously marshalled from other states in the briefs, and so ably discussed at the bar.

The General Code of Ohio, Section 9467, provides:

"The payment of death benefits shall be confined to the family, heirs, relatives by blood, marriage or legal adoption, affianced husband or affianced wife, or to a person or persons dependent on the member."

Section 9469 says:

"Every certificate issued by the association \* \* \* shall provide that the certificate, the charter or articles of association, the Constitution and laws of the association, and the application for membership, medical examination signed by the applicant, shall constitute the contract between the association and the member."

We are not, therefore, left in any doubt as to the fact that the application and those portions of the constitution which we have quoted, are by force of positive law imported into, and have become integral parts of the contract of insurance evidenced by the certificate sued on, to be construed and applied

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and given binding force, whenever they are applicable, as in other contracts, unless their application is limited or modified by some other and controlling countervailing enactment. *German Fire Ins. Co. v. Schill*, 69 O. S., 136, 139; *West et al v. Ins. Co.*, 27 O. S., 1; *Traveler's Ins. Co. v. Myers*, 62 O. S., 529.

It is to be remembered that this is not a case in which the order admits its obligation to pay the benefit to some one, and is a mere stakeholder or interpleader. Nor again, is it a case where the certificate contains no self-executing provision for forfeiture, following upon a false statement, nor where the statement amounts to no more than a direction or representation, not declared by the contract itself to be a warranty. Nor yet is it a case where a valid designation, and therefore a valid contract, was made in the first place with a change later to an invalid designation. And it is not a case where the constitution and laws of the order do not become a part of the contract, either by force of the contract itself, or by the compulsion of a statute.

It is a case of ordinary contractual origin and relations, in which the language of the contract is plain, clear and unambiguous, and not open to enlargement or diminution by construction, unless it is to be aided by some coercive consideration to which we have not so far in this discussion referred. That language, at the crucial point of contract, is this:

"I hereby certify, agree and warrant that all the statements, representations and answers made by me in this application, \* \* \* are full, complete and true \* \* \* and I agree that if any untrue statements or answers are made by me in this application, \* \* \* my beneficiary certificate shall become void and all rights of any person or persons thereunder, shall be forfeited."

By Sections 60 and 66 of the constitution of the order—they being by agreement and by statute a part of the contract sued on here—a forfeiture in case of an untrue answer, is denounced in terms equally explicit.

By Section 3, also above quoted, in case of a failed designation, with no substituted allowable designation—and it would follow, we are bound to suppose, also upon an impossible designa-

tion—the declaration of a forfeiture is just as emphatic, with an added provision for the lapsing of benefits so forfeited into the general beneficiary fund of the order.

Prior to the enactment in Ohio of a statute presently to be mentioned, the law of the state in regard to how this question of the construction of statements in applications for insurance, in cases where the parties have by their contract agreed that they are to be deemed warranties, was, we think tolerably well settled. Its conclusion was that it would leave the parties where they had left themselves.

Without canvassing the decisions of our Supreme Court in this respect along the lines of development, it will be enough for present purposes to call attention to the case of *Insurance Co. v. Pyle*, 44 O. S., 19. In that case the question to be determined arose upon a paragraph in the application for a policy of life insurance, which was in these words:

“It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations, or concealments of facts, then any policy granted upon this application shall be null and void; and all payments made thereon shall be forfeited to the company.”

The court, when it came to deal with the case put the issue in this clear language: “Did the policy ever attach, or was it ever valid?”

It was admitted in the opinion that the avoidance of the policy was sought on the ground of “untrue statements, innocently made” by the applicant.

The question thus propounded by itself to itself, the court answered as follows:

“In this case the (trial) court did not err in holding that the policy ‘is wholly void and of no effect whatever, and was so from the moment it was issued.’ ”

In its opinion in the case the court quotes with approval the following language from *Jeffries v. Life Ins. Co.*, 22 Wall., 47:

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"Any answer *untrue in fact*, and known by the applicant for insurance to be so, *avoids the policy*, irrespective of the question of the materiality of the answer given to the risk. \* \* \*

"Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made a express condition to the existence of a liability on the part of the company."

And the following also, from *Aetna Life Ins. Co. v. France*, 91 U. S., 510:

"The company was not liable if the statements made by the insured were not true. The agreement of the parties that the statements were absolutely true, and that their falsity in any respect should avoid the policy, removes the question of their materiality from the consideration of the court or jury."

And this, from *The Co-Operative Life Assn. v. LeFlore*, 53 Miss., 1:

"A contract of insurance, like other contract, is avoided by an untrue statement by either party as to a matter vital to the agreement, though there be no intentional fraud in the misrepresentation."

And again, the following from *Foot v. Aetna Life Ins. Co.*, 61 N. Y., 571:

"If a policy of insurance declare that the statements made in the application shall be part and parcel of the policy, such statements become warranties and must be true, whether material or not."

And this also, from *Clark v. Manufacturer's Ins. Co.*, 2 Wood & M., 472:

"A warranty is generally a stipulation made and described in the policy itself, and must be complied with, whether material or not. \* \* \* Where a material fact is suppressed in such representations, the insurance is avoided, and the policy does not attach, whether the suppression happens by neglect or fraud."

And at last the court, after its approval of these and other authorities of like import, sums up and fixes the law of the case, in the syllabus, thus:

"1. The provisions of life insurance policy are construed and applied like the terms of any other contract, and such provisions may render the policy void, *ab initio*, by the terms of the same and the failure of warranty.

"2. When a life policy is issued and accepted upon the expressed condition that the answers and statements of the application are warranted true in all respects, and that if the policy be obtained by any untrue answer or statement, or by any fraud, misrepresentation or concealment, 'the policy shall be absolutely full and void'; and as to matters material to the risk some of the answers and statements are untrue in fact, though made without actual fraud and under an innocent misapprehension of the purport of the questions and answers, no contract of insurance is thereby made, and the policy does not attach, but it is void, *ab initio*."

In the case at bar we conceive the untrue statement to be material. It consisted in the applicant undertaking to create by it the relation of dependent, a relation which if established would confer the right of recovery under the certificate on the named beneficiary, but if false no such right would accrue. The truth or falsity of the statement, therefore, went to the heart of the transaction. The life of the benefit depended wholly upon its truth. But for it, and the assumption that it was true and not false, the certificate would not have been issued, and if it was false, the transaction, by the agreed terms of the contract, had no vitality.

If then the materiality of the statement is necessary to bring this case within the letter of the syllabus in *Insurance Co. v. Pyle*, *supra*, in our estimation the necessity is met, and there is no need of falling back to the cases cited, and apparently approved in that case, where these say that under a contract like the one we have in hand, the materiality of the untrue statement is of no moment.

Such we conceive to be the law of Ohio in a case unaided and unaffected by any modifying statute. The application of the rule in its full rigor, however, in many insurance cases necessarily resulted in hardships in some instances—hardships often, no doubt, unmerited. The law is no respecter of persons—not even of worthy and unfortunate persons, and in its dealings with them is sometimes pitiless.

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Accordingly, and without doubt feeling the force of this consideration in its bearing on the helpless, the widow and the stricken, the Legislature passed an act which is now embodied in Section 9391 of the General Code, and which reads thus:

"No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued thereon, or be used in evidence in any trial to recover upon such policy, unless it be *clearly* proved that such answer is wilfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, also that the agent or company had no knowledge of the falsity or fraud of such answer."

Passed, as it must have been, to relieve against the hardness in many cases of the principle announced in *Pyle v. Ins. Co.*, *supra*, it is not to be doubted that if this statute can be applied in the case at bar, it will perhaps operate so as to give the plaintiff a considerable chance of success before a jury, for in that contingency the case would, we suppose, properly go before a jury for a verdict.

Can it be so applied? We think not.

For reasons which, doubtless, seemed to itself to be sufficient, and on grounds of salutary public policy, no doubt, the Legislature has seen fit to enact another statute, which is as follows:

"Section 9465. Except as herein provided, such societies (including, clearly, the defendant) shall be governed by this act, and shall be exempt from the provisions of the insurance laws of this state, not only in governmental relations with the state, *but for every other purpose*, and no law hereafter enacted shall apply to them, unless they be expressly designated therein."

In no such subsequently enacted law is the defendant order expressly or by implication designated, it is believed, and the claimant here is left exposed to all the harshness of the rule in *Insurance Co. v. Pyle*, pushed to its necessary conclusion in this case.

We can not, as none of the cases from other states than Ohio, cited in the argument, do, regard the untrue answer given as a mere direction, or otherwise than as of the substance of the

transaction, even if the parties had not by the express terms of their contract made it substantial, beyond the power of the courts, as we think, to make it otherwise.

Under the law of Ohio, as we are constrained to find it, we must hold that by reason of the untrue answer as to the relation of dependence of the assured to the beneficiary the certificate sued on never attached but was void from the beginning.

It follows that the issue in the case should not have been submitted to the jury at all, and that the court below erred in so submitting it and in the various steps consequent upon such erroneous submission.

The judgment of the court of common pleas is therefore reversed, and judgment against the defendant in error for the costs in this behalf made is allowed—that being the judgment which the court below should have rendered.

#### DEATH AT A STREET AND RAILWAY CROSSING.

Court of Appeals for Hamilton County.

JOHN T. GRUNKEMEYER, ADMINISTRATOR, v. THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Decided, March 21, 1914.

*Negligence—Decedent Found Dead at Railway Crossing—No Witness of the Accident—Presumption as to Looking and Listening—Probable Manner of Death.*

The fact that no one saw the decedent struck by a locomotive at the street crossing, or observed the manner of her death, does not afford ground for taking the case against the railway company from the jury, where the circumstances make probable the fact that she was struck by the locomotive which passed at about the time she would have reached the crossing, and the presumption of law is that she stopped, looked and listened before attempting to cross the track.

*Littleford, James, Ballard & Frost, for plaintiff in error.  
Maxwell & Ramsey, contra.*

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JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

This action was brought to recover damages for the alleged negligent killing of plaintiff's intestate, Frances Grunkemeyer. At the close of the testimony of plaintiff below the court directed a verdict for the defendant because "the court is of the opinion that no person knows how this unfortunate accident occurred; that there will be nothing left for the jury to do but to guess how this unfortunate girl was killed, and the court can not permit the jury to do that, and therefore directs you to return a verdict for the defendant."

The testimony in the case tended to show that the decedent with her uncle, John Scherrer, at 8:10 p. m., left her home on Gladstone avenue five doors west of Harrell street where it crosses the double tracks of defendant company's steam railway, which are upon Gladstone avenue, the north track being for west bound traffic and the south track for the east bound traffic; that defendant's engine No. 8964 backed, tender forward, across Harrell street at about 8:11 p. m., going on the south track; that at or about the same time a freight train crossed Harrell street on the west bound track, and that other trains crossed Harrell street on the west bound track at 8:12, 8:17, 8:25 and 8:46 respectively; that a Norfolk & Western train crossed on the east bound track at 8:54 p. m.

Plaintiff claims that his intestate was killed by defendant's engine No. 8964. Her body was found along the south side of the east bound track, several feet east of Harrell street. It was first seen by a boy, about 8:30 p. m.; and the remains of Scherrer were found badly mutilated on the track eastward from Harrell street at a distance of about 150 feet. This body was not found, nor was the girl's body identified as such until after 9 o'clock. The man's body was badly mangled, as though it had been passed over by a train of cars, and the girl's body showed a wound on the head. The evidence is sufficient to reasonably sustain an inference that both were killed by engine No. 8964. They would naturally have passed along the north side of Gladstone street to Harrell street and south on Harrell street across the railroad tracks on their way to Eastern avenue, as the ordinary means of leaving the Grunke-

meyer home, and they would have reached the crossing at just about the time this engine passed.

The position of the bodies shows a strong probability that they were struck on the south track rather than the north track, and they must have been struck by engine No. 8964 because it was the only train on the south track between the time they left their home and the time the girl's body was first seen, which was before the Norfolk & Western train had passed along the south track.

An additional circumstance that is convincing upon this subject is that a fragment of flesh was found by the men at the roundhouse on engine No. 8964, on the brace on the inside of the cow-catcher where it would naturally have lodged, when we consider that the engine was going backward.

Counsel for defendant have argued that the deceased may have been struck by one of the trains on the west bound track rather than by the train on the south track, and that they might possibly have been struck by the west bound freight and hurled against the east bound locomotive on the other track. The position and condition of the bodies will show that this theory is improbable. If they had been struck by a west bound train the bodies would naturally have been carried west of the crossing instead of as they were, east of the crossing, and the girl's body would have been either between or upon the tracks and more mutilated.

We recognize the rule urged by the defendant, that where one or two or more things may have induced an accident, for one of which the defendant is responsible and for the other of which he is not, it is not permissible to speculate between the several causes and to find that defendant's negligence was the real cause, in the absence of satisfactory foundation in the evidence for that conclusion (*Patton v. Tex. & Pac. Ry. Co.*, 179 U. S., 658; *Smith v. Ry. Co.*, 200 Fed. Rep., 953; *Ry. Co. v. Marsh*, 63 O. S., 236). But the evidence as already discussed convinces the court that this case is not within that rule.

There is evidence tending to show that the railroad company was negligent in the operation of this engine. It was running backwards without a lookout and with no headlight in front,

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and nothing but an ordinary white lamp hanging on the tender. There is testimony from witnesses in the neighborhood that they heard no bell or signal when it crossed Harrell street. The evidence reasonably tended to show that it was running at a speed greater than the ordinance limit of ten miles per hour, showing that it ran a distance of two and a half miles, which included the crossing in question, at an average speed of from twenty-two to thirty miles per hour—although there was no testimony to show that it did not slow up at this crossing.

Contributory negligence was pleaded by the defendant in its answer, but there is no testimony to show it as a matter of law.

“In the absence of evidence to the contrary there is a presumption that one who was killed while crossing a railroad track at night, stopped, looked and listened before attempting to cross the track.” *R. R. Co. v. Landrigan*, 191 U. S., 461.

“In an action for negligent death, decedent is presumed to have used reasonable care for his own safety, in the absence of evidence to the contrary.” *Rothe v. Penn. Co.*, 195 Fed. Rep., 21.

The fact that the freight train on the north track went west at practically the same time that this engine went east on the south track undoubtedly confused plaintiff's intestate and her companion in such a way as to account for the accident.

The rule to be observed by the trial court, upon a motion for a directed verdict, has been so well stated by Ranney, J., in the opinion of the court at pages 646 and 647 in the case of *Ellis & Morton v. Ohio Life Ins. Co.*, 4 O. S., 628, that we quote the following words of the opinion:

“When all the evidence offered by the plaintiff has been given, and a motion for a non-suit is interposed, a question of law is presented, whether the evidence before the jury tends to prove all the facts involved in the right of action and put in issue by the pleadings. In deciding this question, no finding of facts by the court is required, and no weighing of the evidence is permitted. All that the evidence in any degree tends to prove, must be received as fully proved; every fact that the evi-

dence and reasonable inferences from it, conduces to establish, must be taken as fully established.

"The motion involves not only an admission of 'the truth of the evidence, but the existence of all the facts which the evidence conduces to prove. It thus concedes to the plaintiff everything that the jury could possibly find in his favor, and leaves nothing but the question whether, as a matter of law, each fact indispensable to the right of action has been supported by some evidence? If it has, no matter how slight it may have been, the motion must be denied; because it is the right of the party to have the weight and sufficiency of his evidence passed upon by the jury—a right of which he can not be deprived, and involving an exercise of power for which without his consent, the court is incompetent. But where he has given no evidence to establish a fact, without which the law does not permit a recovery, he has nothing to submit to the jury; and the determination of the court, that the fact constitutes an essential element in the right of action, necessarily ends the case."

This rule has been repeatedly stated by the Supreme Court in many cases, among which we cite: *Stockstill v. D. & M. R. R. Co.*, 24 O. S., 83; *Snell v. Ry.*, 54 O. S., 197; *Dick v. R. R. Co.*, 38 O. S., 389; *Gibbs v. Village of Girard*, 88 O. S., 34.

The case, therefore, should have been submitted to the jury on the evidence, under proper instructions by the court, and the court erred in granting defendant's motion for an instructed verdict.

Judgment reversed, and cause remanded for a new trial.

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**TENANT'S RIGHT TO PLACE SIGNS.**

Circuit Court of Cuyahoga County.

**THE GOODYEAR TIRE & RUBBER COMPANY v. THE LOOMIS REALTY COMPANY AND THE B. F. GOODRICH COMPANY.\***

Decided, January 22, 1912.

*Landlord and Tenant—Sign Rights—Covenant in Lease.*

1. The right to place signs upon the outside walls of demised premises, is appurtenant to the premises and belongs to the tenant.
2. An agreement in a lease of part of a building that there shall be no signs placed on the building in the space for signs in front and except that the tenant is given the exclusive right to place its own sign on the west side of the building, is a covenant on the part of the lessor as well as a restriction upon the rights of the lessee.

*Ammerman & Thompson*, for plaintiff in error.*Hills & Van Derveer and Hoyt, Dustin & Kelley*, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

The dispute in this case is about a sign on the west wall of a building on Euclid avenue, in the city of Cleveland, owned by the defendant, the Loomis Realty Company.

The plaintiff claims the exclusive right to exhibit its sign on said wall, under the terms of its lease with the realty company; the realty company says the lease should be reformed so as to show clearly that the plaintiff is not entitled to the exclusive privilege of a sign on said wall; the defendant the B. F. Goodrich Company claims a right to maintain a sign on said west wall under an agreement with the realty company later in date than the lease of plaintiff.

Plaintiff is tenant of the westerly store rooms in the building, which is two stories high, and, without any agreement in the lease, it would have the exclusive right to place signs on the lower half of said westerly wall because it is appurtenant to the premises demised to it. 24 Cyc., 1047.

\*Same judgment rendered in the Common Pleas Court, *Goodyear Rubber Co. v. Loomis Realty Co.*, 12 N.P.(N.S.), 433.

The Goodrich Company is tenant of storerooms further east on Euclid avenue. Having leased the westerly store to plaintiff, and plaintiff having taken possession thereof, the realty company had no right thereafter to give the Goodrich Company any sign rights on the first story of the west wall, unless it reserved said right under the terms of the lease, the important clause of which reads as follows:

"It is agreed that there shall be no signs placed on the building, except in the spaces for signs on the Euclid front and that the party of the second part may desire to have lettered in gold or silver letters on the plate glass window or doors, except that the party of the second part is given the exclusive right to place its own sign on the west side of the building occupying a space not exceeding 40 feet in depth from the front corner of the building, and the full height of the building, which wall sign may be illuminated at the expense of the party of the second part, should the second party so desire."

This language is plain and requires no construction. The first clause, "It is agreed that there shall be no signs placed on the building, except in the space for signs on the Euclid front," etc., is a covenant on the part of the lessor as well as a restriction upon the rights of the lessee, and would forbid *any* sign on the west wall, were it not for the exception in the last clause, that the plaintiff "is given the exclusive right to place its own sign on the west wall of the building," etc.

No evidence has been produced before this court that there was any *mutual* mistake in inserting said clause in the lease, and the cross-petition of the realty company, asking for reformation, is dismissed.

Plaintiff's lease is dated March 3, 1911; it entered into the possession of its store rooms April 1, 1911; about the middle of the month it painted a sign forty feet wide and two stories high on the front end of the west wall; thereafter the realty company attempted to grant sign space on the west wall to the Goodrich Company, and on May 3, 1911, somebody started to paint a sign fifty feet long and two stories high next to the plaintiff's sign.

The plaintiff immediately protested to the realty company, and two days later, it appearing that the sign would advertise the Goodrich Company, plaintiff, on May 6, 1911, requested the

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Goodrich Company to remove its sign, which by that time was complete.

The Goodrich Company, while not claiming any prior contract rights, for the agreements of neither party were recorded at that time, still insisted that it should be permitted to keep its sign in place, because it spent some \$150 in painting it, before plaintiff ordered it to stop.

There is no merit in this defense. The Goodrich Company, when it started to paint its sign, knew that the lower half of the west wall belonged to plaintiff, for it saw plaintiff in possession of the west store. This was notice enough of plaintiff's sign rights on the lower half of the wall, and if the realty company represented to the Goodrich Company that the plaintiff had surrendered any part of said right, the Goodrich Company might have advised itself of the exact terms of the contract, by inquiring of plaintiff. It was apparently a trespasser on this space, and acquired no more rights to the lower half of the wall than a trespasser.

The upper half of the wall is in like case:

Seeing plaintiff's sign covering 40 feet of the upper half of the wall, the Goodrich Company was put upon notice and should have inquired of plaintiff, before painting the sign in question, what right the plaintiff had there.

No estoppel here arises; plaintiff did nothing to encourage the Goodrich Company to paint its sign, nor was it guilty of any laches which should now bar it of the relief prayed for.

Plaintiff immediately notified the lessor not to paint the sign and within three days, having found out who the aggressor was, it notified the Goodrich Company, which was reasonable dispatch in the premises.

Nor was there any waiver of rights on the part of the plaintiff.

Estoppel, laches and waiver are doctrines applied where the equities require it, but the Goodrich Company having failed to prove any legal right to maintain its sign superior to that of the realty company, growing out of lack of notice, and the realty company having covenanted with regard to the matter, its covenant will be enforced.

Judgment for plaintiff as prayed for.

**PAROL CONTRACT TO CONVEY LAND.**

Circuit Court of Cuyahoga County.

**MARY THIBODEAU V. BARBARA KEVERN ET AL. \***

Decided, January 22, 1912.

*Parol Contract as to Lands—Statute of Frauds.*

Payment of the consideration money, possession taken and lasting improvements made by the purchaser of lands under a parol contract, will take the contract out of the statute of frauds.

*H. C. Gahn*, for plaintiff in error.

*Kerruish, Kerruish, Hartshorn & Spooner*, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

This action was heard on appeal, the plaintiff claiming title to certain premises described in her petition, which she occupies and from which the defendants were seeking to remove her by proceedings in forcible entry and detainer. She asks that said proceedings be enjoined and that she have specific performance of a parol contract to convey said premises to her, and for such further relief as may be just and proper.

We find the facts of the case to be as follows:

Upwards of four years ago the plaintiff, who is a widow with four children, the oldest of whom was then about seven years of age, was living with her brother, John Kevern, and supporting herself and her children by working at Chandler and Rudd's. Her brother William Kevern was a widower with no children and owned a piece of land at the corner of E. 91st street and Booth avenue in the city of Cleveland, on which there were then two houses fronting towards the west on E. 91st street, in one of which John lived and in the other, on the corner of Booth avenue, William lived.

Being desirous of a housekeeper, to take care of his house and cook his meals for him, and being desirous also of the

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\*Affirmed without opinion, *Kevern v. Thibodeau*. 88 Ohio State, 603.

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company of his sister and her children, whom he desired to assist in their hard circumstances, he proposed to his sister Mary, the plaintiff that she give up her position at Chandler and Rudd's and come and live with him, act as his housekeeper and be company for him, he agreeing to furnish five dollars a week toward the table board and if that was not enough to pay for all the food needed for himself and Mary and her four children, then she should pay for all in excess of that amount, it being understood that she might have her spare time to work and earn money for that purpose. He also agreed to pay her for her services, but the amount of her compensation was not agreed upon at the time.

So Mary and her children took up their home with William, and Mary gave up her regular position at Chandler and Rudd's, but found it necessary to work there during noon, or rush hour, and to do sewing and take in washing so as to properly feed and clothe herself and children. In this she had help from William, from time to time, for he gave all of the children clothing and shoes, as did also their Uncle John and their grandfather Thibodeau. Indeed, the family in all its branches seems to have been loyal and worthy, understanding their duty to each other and especially to the widow Mary and her four little fatherless children.

This situation continued for about three years, during which time Mary, when she needed clothing for herself, would ask William for money and for payment for her services as his housekeeper, but he would put her off with a small payment of five dollars, telling her he would make it all right with her in the end.

These requests for payment and conversations about the matter occurred five or six times in the three years.

During these three years, William moved two small houses onto the lot, in the rear of his house, fronting them on Booth avenue: the most easterly of these houses he rented to a man named Chico. It was called the Chico place and is the premises now claimed by plaintiff. Chico had a garden in the yard back of his house and seems to have occupied all the land from the east line of William's property, to the second little house immediately in the rear of

the one on the corner, being twenty-six feet front on Booth avenue and extending back 132 feet to William's south line.

Finally, about November, 1910, William told Mary that he was going to get married and bring his wife home, and that she would have to get out with her children and their relations would have to cease. Naturally she wanted to know what was going to become of her and what settlement he was going to make with her for her services, and he said he would give her the Chico place; that it ought to be enough for her, and to this arrangement she assented.

He sent for Chico and told him he would have to get out, for he had given the place to his sister Mary. Chico demurred, said he had always paid his rent, didn't want to get out and offered \$1,000 for the place. William refused to sell, saying he had given the place to Mary, and if he took the thousand dollars he would have to turn it over to her, and if he did she would spend it, and it was better for her to have the home.

There was no gas in the house, and Mary wanted gas pipes run in and two stoves and gas fixtures installed, but William refused to make repairs or improvements, saying the place was hers and she would have to take it as it was—he had done enough for her. So her brother John put in the pipes and stoves and fixtures, Mary paying for the materials. She also did some papering and painting.

On November 16, 1910, Mary and her children moved into the Chico place and have lived there ever since.

In August, 1911, William was suddenly killed in an accident, never having given Mary a deed of the premises in question. She doesn't seem to have understood what a deed was, or that she needed one.

William left one child, the defendant, Elizabeth Kevern, and a widow, the defendant, Barbara Kevern; he left no will. About a month after her husband's death the widow instituted the proceedings in forcible detainer which are sought to be enjoined.

The question is whether the foregoing facts will take the case out of the statute of frauds.

It will be noticed that the consideration here claimed was the services of the plaintiff rendered to her brother as his house-

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keeper and companion for three years. There was never any agreement between the parties as to the value of said services; indeed, on account of the relationship of the parties, it is almost impossible to put a value upon them.

How far the five dollars a week went to feed the children, we do not know; with the high prices prevailing in the last few years, it could not have gone very far. If for the board of himself and his housekeeper he had to pay only five dollars a week, he got off very reasonably, and if the children of Mary during these three years had a roof over their heads and he paid something towards their food and clothing, it is to be ascribed, in this family at least, to his bounty, rather than to compensation in part for Mary's services.

Considering the house worth \$1,000 it may be perhaps, very liberal to pay for Mary's services, but the parties having come to an agreement with reference to a matter which is difficult for others to estimate, we conclude that Mary paid full consideration for the premises.

She was also put in possession of the premises.

In 23 Cent. Dig., 2422, pp. 318, it is said:

"Payment by a purchaser of land by parol, of the consideration money, and possession by him, will take the contract out of the statute of frauds."

Many cases are cited sustaining the text.

Mary also made lasting improvements upon the premises, which though slight, are entitled to consideration.

In the case of *Nhahan, exr., et al v. Swan*, 48 O. S., 25, Judge Bradbury, on page 40 of the opinion says:

"Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal services of the party seeking relief, does not ordinarily constitute such part performance as will take a case out of the operation of the statute of frauds, we do not wish to be understood to hold that cases may not arise wherein specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services, not intended to be and not susceptible of being measured by a pecuniary standard."

In this case, of course, the services were not rendered on a contract for the purchase of the premises; when rendered Mary expected to be compensated in money, but when she accepted the premises in payment for her services, made improvements upon them of lasting benefit to the freehold and took possession, it would seem that the contract to convey then entered into was completely executed, on both sides, the proper evidence of the transaction, in other words, a deed, only, being lacking, to protect her in her possession.

We have examined the opinion of this court in the case of *Schaefer v. Schultz*, decided in June, 1901, and later affirmed by the supreme court without report, 68 O. S., 690, and believe that the principles there announced warrant a judgment in this case in favor of the plaintiff. Indeed, the evidence in this case is clear and uncontradicted, while the difficulty in the case referred to was in determining who was telling the truth.

In the case of *Steinberger v. Hanna*, 42 O. S., 305, the court held that possession under the verbal contract, and payment of part of the consideration, took the case out of the statute of frauds.

As said in the case of *Sites v. Skinner*, 6 Ohio, 484, 489:

“The fact of the vendor’s looking on and seeing improvements made, when he intended to avoid the agreement, amounts to a fraud, and it is upon that ground that relief ought to be afforded.” See also *Kelley v. Stanberry*, 13 Ohio, 408.

The relief prayed for in the petition is granted.

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**INJURY RECEIVED WHILE OILING MACHINERY.**

Court of Appeals for Mahoning County.

**THE NATIONAL COAL COMPANY V. EARL L. POTTS.**

Decided, December Term, 1913.

*Law and Fact—Determination as to Whether Certain Parts of Machinery Are "Shafting" a Question of Law and not for the Jury. When—Piston Rod, Connecting Rod and Crank are not Shafting—Section 1027.*

1. Whether certain parts of machinery are shafting within the provisions of Section 1027, General Code, there being no conflict in the testimony as to the character, appearance and operation of such parts, is not a question for the jury but a question of law for the court.
2. It is reversible error for the jury to find that such parts of machinery are shafting within the provisions of Section 1027 of the General Code, and to return a verdict based in part thereon in favor of the plaintiff in a case charging negligence in respect to the same.

*Charles S. Turnbaugh*, for plaintiff in error.

*J. H. Mackey*, contra.

NORRIS, J.; METCALFE, J., and POLLOCK, J., concur.

This is an error proceeding to reverse a judgment for damages rendered in a personal injury case. The defendant in error, Potts, in his petition in the court of common pleas, after alleging the corporate organization of the plaintiff in error, herein-after called the coal company, alleges further that on the 27th day of April, 1909, he was in the employ of the coal company operating an engine which was used for the purpose of driving a fan in connection with a coal mine. He further alleges that in the "operation of said machinery the piston rod, the same being about twenty-seven inches long, was fastened at its east end with an iron connecting rod about three feet long, which in turn was connected at its east end with an iron crank about fifteen inches long, the other end whereof was fastened to the south end of said fan shaft, and all the same so fastened to-

gether was a shaft operating horizontally near the floor to drive said fan shaft and the fan, and was a part of said engine and an appliance thereof; that when the engine was in operation the movement of the piston rod forward and backward, which in turn drove said crank, causing the crank to move in a revolving manner in a circle having the end of the fan shaft for its center, all the same together in this matter operating horizontally near the floor, as heretofore alleged, and all of which in operation revolved said fan shaft and the fan attached to the north end thereof; that in operation the said shaft, consisting of said piston rod, connecting rod and crank, moved in a line parallel with and only about one-quarter of an inch south of the south side of the foundation and the end of the crank whereto the iron connecting rod was attached, at the farthest point to which it was driven in operation, went beyond the southeast corner of the piece of iron resting crosswise on the foundation at the east end about thirteen inches, and went beyond the east edge of the foundation about three inches, and at its farthest point downwards went below the south end of the cross piece of iron and the top of the foundation about eleven inches."

He further alleges that the said machine and its appliances were in a defective condition in the following respects: Said revolving fan shaft and the piece of iron whereon its bearings rested was set so near the east edge of the foundation that the crank in its revolution passed beyond the southeast corner of said piece of iron about thirteen inches, and passed beyond the east edge of the foundation about three inches; that the fan shaft extended beyond the south line of the foundation but three inches, because whereof said shaft, consisting of said piston rod, connecting rod and crank, worked on a line within one-quarter of an inch of the south line of the foundation and south thereof; that the fan shaft and its bearings lay within six inches of the top of the foundation, by reason whereof the crank in its revolution went beyond the level of the top of the foundation: that the condition of the machine was further defective in these several respects, to-wit:

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"Said shaft consisting of said piston rod, connecting rod and crank fastened together and operating, as hereinbefore alleged, horizontally near the floor of the building, and not cased or boxed, said crank was too long and in revolution described a circle about thirty inches in diameter and passed beyond the southeast corner of said piece of iron whereon the shaft rested, and beyond the east edge of the foundation and passed below the level of the top of the foundation, and in operation was liable to jerk anything coming in contact with it down between it and the foundation."

While greasing said machinery plaintiff says that in the exercise of due care some of the rags in his hand caught in the said crank which suddenly jerked his right hand down between the south end of a piece of iron lying crosswise and said crank as it descended in its motion, injuring his hand by crushing and cutting off the first three fingers thereof.

The defendant, for answer, denies all charges of negligence and alleges that plaintiff's injuries were caused by his own negligence. The case was tried to a jury, who returned a verdict in favor of the plaintiff for \$2,200, and also, at the request of defendant, returned the following special verdicts:

"Special verdict No. 1. Do you find that said piston rod and connecting rod and crank fastened together was a shaft or shafting? Answer, Shafting.

"Special verdict No. 2. If you find by your general verdict in favor of the plaintiff, state whether or not you find in favor of plaintiff upon all or part of the negligence alleged in plaintiff's amended petition? Answer, Part.

"If your answer to above question is that you find for plaintiff upon part of the negligence alleged in his amended petition, then state which negligence or negligences you so find in his favor, and also state whether you find that operating alone or together plaintiff's injuries were caused thereby. Answer, Deficient in construction of foundation and lack of boxing or casing of shafting together."

The first error alleged is that the special verdict No. 1, as submitted by counsel for defendant to the court, did not contain the words "or shafting" at the end thereof, and that the court committed error in adding those words to the special verdict.

Without discussing the question as to the right of the court to amend a special verdict, we think the addition of the words "or shafting" were in no wise prejudicial to the defendant.

It is now urged that whether or not this engine piston rod and the connecting rod and crank which turned the shaft were "shafting," was a question of law for the determination of the court and not a question for the jury, and that the court erred in submitting it to the jury, but this question was submitted to the jury at the request of defendant and if it was error defendant can not now complain. But this still leaves the question as to what it was, and as to whether or not the finding of the jury upon that question was manifestly against the weight of the evidence. It may be said at the start that there was no conflict in the evidence as to the description of the piston rod, connecting rod and crank. Photographs of these appliances were brought into the record showing views of them from different standpoints, and there is no controversy as to how they operated.

The question arises under Section 1027 of the General Code, which provides:

"The owners and operators of shops and factories shall make suitable provisions to prevent injury to persons who use or come in contact with machinery therein, or any part thereof as follows:

"1. They shall case or box all shafting operating horizontally near floors, or perpendicularly between, from or through floors, or traversing near floors, or when operating near a passage way or directly over the heads of employees."

Now, is the definition or meaning of the word "shafting" as used in that section and applied to machinery, a question of fact for the jury or a question of law for the court? And, whichever it is, does the piston rod of an engine, cross head, connecting rod and crank come within the provisions of that statute? There being no dispute as to the exact character of these appliances, we think it was clearly a question of law for the court to determine whether or not these pieces of machinery taken together came within the provisions of that statute. *Pa. Co. v. Rothgeb*, 32 Ohio St., 66; *L. S. & M. S. Ry. Co. v. Lüdtke*.

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69 Ohio St., 400; *Gas Company v. Archdeacon*, 80 Ohio State, 38.

The ordinary meaning is to be given to words used in the statute. *Slinghuff v. Weaver et al*, 66 Ohio St., 621-627; *Smith Brewing Company v. Bowman*, 41 Ohio St., 52; *Tyler's Ex'rs v. Winslow*, 15 Ohio St., 366.

Two witnesses, both called by plaintiff, who were engineers, testify in substance that these appliances referred to were not generally understood to be or called "shafting." We do not think any definition can be found of the word "shafting" which would include a piston rod of an engine and the connecting rod and crank. We do not think they are ever called shafting by people who describe machinery, but again, as stated in *Rohdes v. Weldy*, 46 Ohio St., 324, reading from the syllabus:

"Where the same word or phrase is used more than once in the same act in relation to the same subject-matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is doubtful or obscure it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed, plainly calling for a different construction."

Now, in this same section, Section 1027, sub-division 3, we find the word "shafting" used as follows:

"They shall cover, cut off or countersink keys, bolts, set screws and all other parts of wheels, shafting or other revolving machinery projecting unevenly beyond the surface of such revolving machinery."

Clearly the Legislature in the use of the word "shafting" in that section, used it as it is generally understood, as a revolving shaft connecting the power to machinery, and did not use it in the sense of a piston rod and connecting rod. To the same effect is *Raymond v. Cleveland*, 42 Ohio St., 522-529, and *Norris v. State*, 25 Ohio St., 224.

So that we find as a matter of law that the piston rod, connecting rod and crank were not shafting within the meaning of that statute, and that the special finding of the jury is manifestly

wrong. It follows from that, that inasmuch as the jury found or based their verdict in part because of lack of boxing or casing of shafting, that their verdict is manifestly against the evidence.

The judgment of the court of common pleas will be reversed and the case remanded for a new trial.

### **WITNESS PROTECTED AGAINST ACTION FOR DAMAGES.**

Court of Appeals for Jefferson County.

**EDWARD J. BICKERSTAFF V. WILLIAM HINGSLEY AND EDWARD BERTELL.**

Decided, May Term, 1913.

*Privilege—Action Does Not Lie Against Witness for Slander—Not Subject to Civil Action Even Though it be Alleged the Testimony Was False.*

Where a witness in a judicial proceeding testifies to matters pertinent to the issue, an action can not be maintained against him by the party against whom such testimony is given, on the ground that the testimony is false and was the cause of the judgment rendered against such party.

**METCALFE, J.; NORRIS, J., and POLLOCK, J., concur.**

Plaintiff in error was plaintiff below. A demurrer was filed to the plaintiff's petition in the common pleas court. The demurrer was sustained by that court and the plaintiff not desiring to plead further judgment was rendered against him on the pleadings. The petition avers, in substance, that in an action in which the plaintiff herein was defendant, an injunction was issued against him prohibiting him from trespassing upon a certain coal mine; that he was arrested upon an order issued in a contempt proceeding for a violation of said order of injunction, and that upon a hearing of such charges in contempt both of the defendants testified that at certain times they had seen him upon the premises doing acts which were in violation of the order of the court. He avers that such testimony was false, and that by reason of such false testimony judgment was rendered against him in the contempt proceeding and he was thereby greatly injured.

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The only question presented by the demurrer in this case is whether statements pertinent to the issue on trial made by witnesses called upon to testify in a judicial proceeding are privileged, or if a witness having testified to a fact which is pertinent to the issue can be subjected to an action for damages on the ground that such testimony is false. It can readily be seen that if an action can be maintained against witnesses on account of pertinent statements made by them upon the trial of causes in court how very much the administration of justice would be hampered, and what a drag there would be upon the testimony of witnesses. If the rule prevailed that when a witness testifies in *good faith* in the ordinary course of justice, as they are required to do, that if they testified against the interest of one of the parties they could be subjected to an action for damages, how loath they would be to testify at all, and what a great temptation there might be in many cases to obscure or avoid the truth altogether. An examination of the law upon this subject leads us to the conclusion that the rule is an inflexible one that witnesses who testify to pertinent facts can not be subjected to a civil action even though it be alleged that such testimony is false.

In the case of *Liles v. Gaster*, 42 O. S., 631, it is held that such action can not be maintained. In the opinion on page 635 it is said:

"The general rule is that language used in the ordinary course of judicial proceedings, whether by the judge, a party, counsel, jurors or witnesses is protected if it be relevant to the matter under consideration, and the court have jurisdiction, the privilege accorded to a witness under such circumstances is founded upon public policy. The due administration of justice requires that a witness should be perfectly free to speak according to his belief without regard to consequences. He is sworn to tell the truth, the whole truth, and nothing but the truth concerning the matter in trial. While doing so in good faith he is absolutely privileged, and can not be found guilty of perjury nor is he liable to a civil action; thus far all the authorities agree."

The question is ably and thoroughly discussed in the case of *Hunkle v. Voneiff*, 69 Maryland, 169, also reported in 9 Am. St. Rep., 413. I quote from the opinion on page 414, 9 Am. St.:

"The case now before us is not that of an advocate, but of a witness, and in our opinion it is of the greatest importance to the administration of justice that witnesses would go upon the stand with their minds absolutely free from apprehension that they may subject themselves to an action for slander for what they may say while giving their testimony."

And again on page 415, after citing a number of cases he says:

"Willes, Coleridge, Cockburn, Blackburn, Kelley, Creswell, Lord Cairns, and other eminent jurists have again and again expressed the opinion that the privilege of a witness should be absolute, have pointed out the great benefit of such privilege to the administration of justice, and have deprecated in strong terms the evil consequences they thought would ensue if witnesses were placed under any intimidation or the fear of being involved in litigation by reason of what they might say when under examination."

This case holds that a party who utters slanderous words of another while upon the witness stand was not liable to an action for damages for those words. In the note on page 421, quoting from the case of *Henderson v. Broomhead*, 4 Hurl. & N., 577, it is said: "The rule is inflexible that no action will lie for words spoken or written in the course of giving evidence." The note in this case in 9 Am. St., *supra*, contains a very able exposition of the doctrine, and see also 22 Am. & Eng. Ency. of L., 698 (second edition).

It was said in argument that if a judgment be procured by false testimony, if the party can have no redress against the offending witness by way of an action for damages that he is without remedy at law, but this is not so. Under the statutes of Ohio, if it be afterwards found that the judgment has been procured in whole or in part by false testimony, and the party giving the false testimony has been convicted of perjury, the judgment may be set aside on the application of the party aggrieved, and an action can be sustained for that purpose. General Code, Section 11681.

We think the judgment of the court below was right and the same is affirmed.

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Cuyahoga County.

**DUPLICATE MOTION MAY BE STRICKEN FROM FILES.**

Circuit Court of Cuyahoga County.

**THE POPLOWSKY PLUMBING CO. v. D. H. ROSENSTEIN.**

Decided, February 5, 1912.

*Striking Motion From Files—Duplicate Motion.*

A court is not required to pass upon the same matter more than once; hence there is no error in striking from the files a second motion to vacate a default judgment identical with one overruled five days before.

*Harry Koblitz, for plaintiff.*

*J. Mendelson, contra.*

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

The error here complained of is striking from the files a motion to vacate a default judgment. Such action was taken by the trial court because five days before it had overruled a similar motion made by plaintiff in error.

We see no error in this ruling; the court is not required to pass more than once upon the same matter; otherwise there would be no end to litigation.

Judgment affirmed.

**NOT BOUND TO ANTICIPATE THE NEGLIGENCE OF ANOTHER.**

Circuit Court of Cuyahoga County.

**FERDINAND ZIGANEK V. THE CLEVELAND RAILWAY COMPANY.**

Decided, February 5, 1912.

*Contributory Negligence—Automobile Crossing Track in Front of Car.*

While one about to cross a street car track with an automobile in front of an approaching car is bound to use his faculties for his own protection, yet ordinary care does not require of him that he anticipate negligence on the part of those operating the car, and whether or not he did exercise ordinary care in the light of all the circumstances, in attempting to cross the tracks in front of the approaching car, is a question which he has a right to have submitted to a jury.

*B. Pearce and C. N. Sheldon, for plaintiff in error.*

*Squire, Sanders & Dempsey, contra.*

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The plaintiff in error brought suit in the court of common pleas against the defendant in error to recover damages for personal injuries suffered by him when he was struck by street car, operated by the defendant, as he was in the act of crossing to street car track in an automobile.

The pleadings and the evidence show that the plaintiff, between 8 and 9 o'clock in the evening of August 12, 1908, was going westward on St. Clair avenue, in the city of Cleveland, driving an automobile, on the northerly side of the street; that as he approached East 45th street he turned the automobile to the southward for the purpose of going up said 45th street; that as he was turning across the street a suburban car, owned by the Cleveland, Painesville & Eastern Railway Company, and operated by the defendant, was approaching from the west on the south track in St. Clair avenue; that as the plaintiff was going upon the track on which this suburban car was running, he discovered the car almost upon him and tried to reverse the automobile, and while so doing the front

part of the automobile was struck by the car and he was severely injured.

It appears further that the car had bright headlights which the plaintiff claims were so dazzling as to be confusing to the eye and misleading to one not accustomed to viewing the same; that the plaintiff had seen the car approaching a considerable distance away, and at the time he turned to cross the track for the purpose of going into 45th street, it was opposite East 43rd street, a distance of between 300 and 400 feet from the point where the plaintiff attempted to cross the street; that according to the testimony of certain witnesses the car was running at a high rate of speed, estimated by one witness to be from twenty-five to thirty miles an hour; that after striking the automobile, the car ran a distance of about 125 feet before coming to a stop.

When the plaintiff had rested, the court on motion of the defendant, instructed the jury to return a verdict for the defendant, and it is the correctness of this action that is called in question by this proceeding in error.

The motion was based upon the ground that the undisputed and controlling facts produced in evidence by the plaintiff showed no actionable negligence on the part of the defendant, and that the plaintiff had not overcome the presumption of contributory negligence.

There was evidence in the case that tended at least to show negligence on the part of the defendant in the operation of the car, and the action of the trial court must be sustained, if at all, on the ground that the undisputed and controlling facts showed contributory negligence on the part of the plaintiff.

The rights and duties of those about to cross the tracks of a street railroad at a street crossing are discussed and defined in *Cincinnati Street Railway Company v. Snell*, 54 O. S., 197, and it was there held:

"A person about to cross the track of a street railway at a street crossing is bound to exercise care proportioned to the danger to be avoided, and the consequences which might result from want of it, conforming in amount and degree to the particular circumstances surrounding him; but it is only ordinary care which is required, that which might reasonably be expected of persons of ordinary prudence. Ordinary care does not re-

quire him to anticipate negligence on the part of those operating the railway, and while he should use his faculties for his own protection, it is not negligence *per se* for him to omit to look in both directions for the approach of a car; whether it is or not negligence depends upon the circumstances."

Applying the principle laid down by the Supreme Court in this case to the one under consideration, it may be said that the plaintiff was bound to use his faculties for his own protection, but ordinary care did not require of him that he anticipate negligence on the part of those operating the car, and whether or not he did exercise ordinary care in the light of all the circumstances, in attempting to cross the track in front of the approaching car, was a question which he had a right to have submitted to the jury.

There was evidence which tended to show, in some degree, that if the suburban car had been operated with reasonable care, it might have been stopped after the plaintiff had started across the track, and before the accident occurred. The plaintiff had a right to assume that such reasonable care would be exercised by the defendant.

The facts in this case are very similar to those in *Toledo Street Railway Company v. Westenhuber*, 22 C. C., 67, in which parts 1 and 2 of the syllabus read as follows:

"It is negligence in the motorman of an electric street car, when the car is from 150 to 200 feet from a crossing, and he sees a wagon about to cross the track, not to try to stop or slacken the speed of the car until almost at the crossing, when by so doing the collision which ensued might have been avoided.

"It is not negligence in the driver of a wagon to attempt to drive across a street car track ahead of an approaching electric car, when the car is so far away that by the exercise of reasonable care, it might be stopped before reaching the place of crossing."

It was contended in that case the driver was guilty of contributory negligence in entering upon the tracks, because before his horses came upon the track he distinctly saw the car approaching, nor more than two hundred feet away; that he saw it approaching at a rate of speed that would run him down, unless

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the speed of the team should be very much accelerated or the speed of the car should be restarted; yet he entered upon the track to cross over, and was struck.

In answering this contention the court used language that is pertinent to the circumstances of this case. On page 69 the court said:

“To attempt to drive across a track ahead of a street car when the car is so far away that by the exercise of reasonable care on the part of the operators it might be stopped before reaching the place of crossing, is not negligence in our opinion. The rights of the street car company and of the driver of the team being equal at the crossing, he had a right to go over the crossing ahead of the car, notwithstanding the fact that his doing so would require that the speed of the car must be retarded to prevent a collision. The one first at the crossing had the right to precede the other in going over the same. It is plain, the driver of the team must take into consideration the fact that the street car can not turn out, it must remain upon the rails, and he must take into consideration the fact that it can not stop instantly, that if it is going at a high rate of speed it may require considerable distance for it to stop; but taking all these things into consideration, if he enters upon the track when the car is so far away as that it may, by the exercise of reasonable diligence on the part of the operator be stopped, he is not, in our opinion, guilty of negligence in thus entering upon the track.”

The decision of the circuit court in that case was affirmed by the Supreme Court, without report, in 65 O. S., 567, and upon its authority, if no other existed, we would be compelled to reach the conclusion announced.

The Judgment of the court of common pleas is reversed and the cause remanded for further proceedings.

**PROPER CONSTRUCTION OF REPRESENTATIONS DESCRIPTIVE  
OF OCCUPATION.**

Court of Appeals for Darke County.

**AMERICAN FIDELITY COMPANY v. MAGGIE A. PATTY.\***

Decided, January 6, 1913.

*Accident Insurance—Stipulations of Policy With Reference to Hazards  
of Different Classifications—Overlapping of Occupations and Iso-  
lated Acts Involving Greater Hazard.*

In the absence from a policy of accident insurance of an exception based on specific acts, an isolated act by the insured commonly connected with a more dangerous occupation than that named in the application for insurance does not reduce the amount of the policy to the basis of the more hazardous risk.

*Dale & Kusworm*, for plaintiff in error.

*Bickel & Baker*, contra.

ALLREAD, J.; FERNEDING, J., and KUNKLE, J., concur.

The original action was brought by the beneficiary upon a policy of insurance issued to one W. O. Patty, insuring against loss of life from bodily injury caused by external, violent or accidental means. It is averred that the assured while in the performance of the duties of his occupation as set out in said policy fell from a moving car and was fatally injured.

A number of defenses are set forth in the answer. These defenses, excepting the first, relate to a claim of the insurance company that Patty, at the time of his injury, was engaged in an extra hazardous occupation which by virtue of the policy itself reduced the claim to the sum of \$300.

The case was tried before the court and a jury and resulted in a verdict and judgment in favor of the plaintiff for \$6,000, the full amount of the policy. Motion for a new trial was overruled and the case was brought here upon petition in error.

The defense rests upon the following representation in the application and made a part of the policy, to-wit:

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\*Writ of certiorari applied for and refused by the Supreme Court.

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"The duties of my occupation are as follows: secretary and manager, office duties and superintendent. No manual labor."

And also upon the following condition in the policy:

"If the insured is injured fatally or non-fatally while engaged in an occupation or employment, classed by the company as more hazardous than that written in the application for this policy, the company's liability shall be only for such amount as the premium paid by him will produce at the rate fixed for such increased hazard in the manual of the company."

The evidence shows that W. O. Patty, the assured, was a member of a partnership engaged in mining, washing and shipping gravel and while so engaged, in an emergency as an isolated act, he boarded a small dump car for the purpose of braking it as it descended to the hopper, fell and was injured. The evidence as to these facts is not conflicting, but all the evidence tends to support the facts as stated.

The controversy is largely, if not wholly, a question of law.

Counsel for the insurance company contend that the company is not liable for the full amount of the policy, but only for the amount provided for in the exception for the extra hazardous occupation. Counsel for the plaintiff below contends that the company is liable for the full amount although the injury grew out of an isolated act involving a more hazardous occupation. The controversy must be determined from the language employed in respect to the occupation and in connection with the general scope and purpose of the insurance contract.

The representations of the assured as to the duties of his occupation were undoubtedly material and a controlling element in the contract of insurance. The condition above recited may be construed as an exception. It was undoubtedly the main purpose of both parties to the insurance contract to stipulate for the full amount of insurance, and that the reduced amount should apply only in the special cases specified in the exception.

In reading and construing the so-called exception, we are justified in following the principle announced by Spear, J., in the case of *The U. S. Mutual Accident Association v. Hubbel*, 56 O. S., 516, 527, as follows:

"But it must be borne in mind that language of exceptions in such policies limiting the liability of the company are to be construed favorably to the insured and doubts and ambiguities resolved against the insurer."

The representation of the assured's occupation should not be construed as an absolute guarantee by the assured that "no manual labor" would be performed. In the very nature of occupational insurance such a construction would limit the scope of the policy to a very narrow range. This representation is merely descriptive of the occupation and should be construed with the condition above quoted which contains the stipulation controlling the liability and reducing the amount. The exception is based upon occupation rather than upon single acts involving hazard.

This is an important distinction to be kept in mind in reviewing and harmonizing the decisions upon this subject.

The exception under consideration is limited to cases where the insured is injured "while engaged in the occupation or employment classed by the company as more hazardous than that written in the application for this policy." To reduce the company's liability to the smaller sum the insurance company contends that the company's liability is graduated by the hazard and fixed by the classification as applied to the occupation of an ordinary brakeman.

A single act does not determine an occupation. Occupations often overlap and a person clearly within a certain occupation is sometimes called upon in an emergency to perform an act naturally appertaining to a different occupation. Yet in common parlance, the person exercising the isolated act does not change his occupation. The application in the case under consideration notified the insurance company that W. O. Patty was a member of the firm operating this plant, and that in addition to office duties he was superintendent of the plant. It would only be reasonable to assume that while his occupation did not call for manual labor, yet more or less manual labor in connection with the management of the plant would be expected of its superintendent in cases of emergency.

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In the case of *The Union Mutual Accident Association v. Frohard*, 134 Ill., pages 228, 234, this definition is found:

"The word occupation as found in these by-laws, must be held to have reference to the vocation, profession, trade or calling which the assured is engaged in for hire or for profit, but not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, or from engaging in mere acts of exercise, diversion or recreation."

In *Hess v. Preferred Masonic Mutual Accident Association of America*, 112 Mich., 96, it is held:

"A provision in an accident policy that it shall be void as to all accidents occurring to the insured when engaged in any profession, employment or exposure not rated as preferred, does not apply to the casual performance of an act pertaining to an accepted risk if in the particular case it pertains incidentally to the regular employment of the insured."

*Niblack on Accident Insurance*, Section 409, holds:

"A change of occupation means an engaging in another employment as a usual business. It does not apply to temporary employment during leisure hours, to acts done outside of one's usual and ordinary business, or the casual employment in a different business."

We find the same principle maintained by the following cases cited by counsel for plaintiff below: *Administrator of Stone v. Casualty Company*, 34 N. J. Law, 371; *N. A. Life Insurance Company v. Burroughs*, 69 Penn. State, 43; *Tucker v. Insurance Company*, 50 Hun., 50; *Berliner v. Travelers Insurance Co.*, 121 Cal., 458; *Standard Life Insurance Co. v. Fraiser*, 76 Fed., 705; *Brink v. Guarantee Mutual Accident Association*, 55 Hun., 606; *Johnson v. London Guarantee Company*, 115 Mich., 86; *Kentucky Life & Accident Insurance Association v. Franklin*, 102 Ky., 512; *Willey Casualty Company v. Shepard*, 61 Kans., 351; *Schmidt v. American Casualty Accident Association*, 96 Wis., 304; *Holliday v. American Mutual Accident Association*, 103 Ia., 178; *Huffman v. Standard Life & Accident Company*, 126 N. C., 337.

The cases chiefly relied upon by counsel for plaintiff in error are founded upon exceptions which are specific as to the act from which the injury resulted. The exception in those cases relates not merely to the occupation but to the classification of the particular act or hazard from which the injury resulted.

Counsel for plaintiff in error especially rely upon the unreported case of *Gotfredson v. German Commercial Accident Company*, tried before Judge Angel of the United States District Court of Michigan in 1912, wherein there was an instructed verdict for the insurance company upon the basis of an extra hazardous risk.

The application contained the following statement:

"My occupation and duties are fully described as follows; proprietor; no manual labor."

The exception clause of the policy was as follows:

"If the assured is injured after having changed his occupation for one classified by the company as more dangerous than that herein stated or is injured while doing any act or thing pertaining to any more hazardous occupation, the liability for any loss specified shall be such an amount as the premium paid by him will purchase at the rate fixed by this company for such more hazardous occupation."

An examination of this exception clause will disclose that it is based not only upon a change of occupation, but also upon the "doing any act or thing pertaining to any more hazardous occupation." This is, in our opinion, a clear distinction between that case and the one at bar wherein the exception is based upon occupation and not upon specific acts. We have examined the following cases cited by counsel for plaintiff in error. *Lane v. Insurance Company*, 113 Southwestern, 324; *Moody v. National Masonic Accident Association*, 92 Northwest, 613; *Eggenberger v. Guarantee Mutual Accident Association*, 41 Fed., 172; *Metropolitan Accident Association v. Hilton*, 61 Ill. App., 100; *Railway Officials & Employees Accident Association v. Bradley*, 97 Ill. App., 355; *Loesch v. Union Casualty Co.*, 176 Mo., 654.

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These cases have a stipulation or exception very similar to the one involved in the Gotfredson case.

We have examined the other citations made by counsel for plaintiff in error and we find that most, if not all of them, are cases where there was an actual change of occupation, and not involving isolated acts. See *Standard Life & Accident Insurance Co. v. Cartoll*, 86 Fed., 567; *Employers Liability Co. v. Back*, 102 Fed., 229; *Aldrich v. Mercantile Accident Association*, 149 Mass., 457.

In *Thomas v. Masonic Fraternal Accident Association*, 64 App. Div. (N. Y.), 22, the exception related to injury in any occupation, temporary or otherwise, involving extra hazard as classified. The exception was held to apply to the case of a lawyer injured while engaged in hunting.

In *Estabrook v. Union Casualty & Surety Co.*, 74 Vt., 473 (52 Atl., 1048), the assured classified as "proprietor of gist mill, supervision only" was injured while using a hay rake upon his father's farm. Held: Liability reduced to basis of more hazardous occupation, but distinguishing the case upon the ground that the assured's temporary occupation was not incidental to that represented in the policy.

In *Knapp v. Preferred Mutual Accident Association*, 53 Hun. (N. Y.), 84, the operation of the buzz saw, which occasioned the injury, was not a mere isolated or emergency act, but more or less a feature of the assured's occupation.

So far as we have been able to ascertain there are no cases except the Thomas and Estabrook cases where it is held that an isolated act involving a more hazardous occupation reduced the amount of the policy to the basis of the extra hazardous risk in the absence of an exception based upon specific acts.

We, therefore, hold that the engaging by the assured in an isolated act outside of his represented occupational duties, but incidental thereto, does not violate his policy nor under the general terms of his policy reduce the company's liability to that based upon a more hazardous occupation.

It follows that the trial court correctly instructed the jury as to the basis of liability, and that the evidence justified recovery of the full amount of the policy.

There is an objection to the charge of the court as to the burden of proof. We are inclined to think that this charge is in harmony with the opinion of Judge Spear in the Hubbel case above cited. Still if the charge as to the burden of proof is erroneous, we would be required to ignore it under Section 11364, and sustain the verdict and judgment because in harmony with the substantial justice of the case. We are greatly indebted to counsel for the able presentation of the questions represented by the record and the thorough research and review of the many authorities bearing upon the law of the case.

The judgment of the court of common pleas will, therefore, be affirmed.

#### **MAINTENANCE OF CHILD BY DIVORCED HUSBAND.**

Court of Appeals for Hamilton County.

EMIL GEBERT v. JOSEPH HOWARD.

Decided, April 12, 1913.

*Parent and Child—Claim of Husband of a Divorcee for an Additional Amount for Support of Her Child Will Not be Upheld, When.*

Where a divorced woman remarries, and her first husband contributes to the support of her son who remains in her custody, the second husband can not, after a lapse of five years or more, maintain an action against the first husband on a claim then for the first time asserted for a balance due for the boy's maintenance.

*M. C. Lykins*, for plaintiff in error.

*H. H. Hosbrook*, contra.

JONES, O. B., J.; JONES, E. H., J., concurs; SWING, J., not sitting.

Plaintiff married the divorced wife of defendant, who was the mother of defendant's son then about eleven years of age. The boy was brought by his mother into the household of plaintiff and became a member of his family. Under successive arrangements between the boy's mother and the defendant weekly

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sums were paid to her by defendant for the maintenance of the boy, being first at the rate of \$2 per week for a period of 86 weeks; then \$4 per week for 88 weeks, and then \$5 per week for the remainder of the time. When these sums were received by the mother she turned them over to the step-father, plaintiff herein, who admits that he knew she was receiving them from the boy's father, defendant herein, but denies that he knew the terms of any contract or contracts for same made with him by the mother.

Plaintiff, however, made no objection to defendant as to the amounts that were being paid by him, and appears to have made no demand for any additional payment until the bringing of this suit, in which he claims for the full period from June 27, 1906, the date of his marriage, to January 6, 1911, at the rate of \$4.50 per week for board and clothing furnished the boy and allowed a credit for the total amount paid of \$820—claiming a balance of \$246.50.

There is no evidence that the amount claimed was the value of the necessary board and clothing or that the father had failed to supply same.

Under the facts shown by the evidence, it is a question whether plaintiff has not placed himself in *loco parentis* with relation to the boy, and whether he could make a claim against the boy's father for maintenance after it had been furnished without any arrangement or contract with him, and without showing demand upon him to furnish such necessities and failure on his part to do so. But the continued receipt by plaintiff, without objection, of the weekly payments as made by defendant to the mother, leads to the belief that he must have been informed of the contract with the mother and assented to it, or if not fully informed that he must have been satisfied at the time with the amounts paid.

The court below instructed a verdict for defendant. On consideration of the testimony set out in the bill of exceptions and the record of the case below the court finds no error to the prejudice of plaintiff and the judgment is affirmed.

**DAMAGES FOR WRONGFULLY ATTACHING PROPERTY.**

Circuit Court of Cuyahoga County.

**GLENN E. GRISWOLD AND THE BANKERS SURETY COMPANY V.  
HELEN TUCKER.**

Decided, February 5, 1912.

*Bond of Justice of the Peace—Surety Liable for Misconduct of Special Constable—Statute of Limitations.*

The obligation on the part of a surety on the official bond of a justice of the peace to respond in damages to one who has been injured by the misconduct and illegal acts of a special constable arises out of the bond on which he is surety, and the limitations on an action brought to enforce such obligation is ten years.

*C. A. Dille*, for plaintiff in error.*Harry F. Payer* and *H. A. Cummings*, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

On the 8th day of August, 1902, the plaintiff in error, Glenn E. Griswold, was a justice of the peace in and for the township of Collinwood, in Cuyahoga county, and the plaintiff in error, the Bankers Surety Company, was surety on his official bond. On the day mentioned, the said Glenn E. Griswold, in a certain action pending in the court of said justice appointed one R. A. Hudson special constable for the purpose of attaching certain property of the defendant in that action, under an order of attachment issued therein. Hudson, acting as such special constable, wrongfully attached and held property belonging, not to the defendant in said action, but to Helen Tucker, the defendant in error, who in another suit begun in the court of another justice of the peace against Hudson recovered a judgment against him on the 20th day of August, 1902, for the value of the property wrongfully attached and damages for its illegal detention. This judgment not being satisfied, the defendant in error, on May 26, 1909, brought suit against the plaintiffs in error in the court of common pleas to recover the amount adjudged her in her ac-

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tion in the justice court, and other damages suffered by her on account of the misconduct and illegal acts of the said special constable. In the court below the defendant in error recovered a judgment against the plaintiffs in error, which the latter seek in this proceeding to have reversed.

The plaintiffs in error contend that the cause of action sued upon was barred by the statute of limitations, and that the trial court erred in not so holding.

This contention is based upon the claim that the cause of action set forth in the petition is governed by the limitation prescribed by Section 11222, General Code, which contains a provision, in substance, that an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within six years after the cause of action accrues.

The defendant in error contends that Section 11226, General Code, controls the time within which her action could be brought. This section is as follows:

“An action upon the official bond or undertaking of an official, assignee, trustee, executor, administrator or guardian, or upon a bond or undertaking given in pursuance of a statute, can only be brought within ten years after the cause of action accrues; but this section shall be subject to the qualifications in section forty-nine hundred and seventy-six.”

A determination of the nature of the cause of action contained in the petition of the plaintiff in the court of common pleas will decide which of the sections of the statutes referred to should govern. If the cause of action is one founded upon a liability created by statute, it would be barred in six years; if the action is upon the official bond of the plaintiff in error, Glenn E. Griswold, the time would be ten years.

The authority for the appointment of a special constable by a justice of the peace is found in Section 3333, General Code, which, after conferring the power upon the justice to make such appointment in certain cases, provides:

“Such justice shall stand as surety, and shall be in that character liable, he and his sureties, for any neglect of duty or any illegal proceedings on the part of such constable so by him appointed.”

The only obligation of the sureties on the bond of a justice of the peace must be based upon the bond itself. Their liability arises by reason of their having signed the bond. In executing that instrument as sureties they would be held, however, to have acted in contemplation of the law making them liable with their principal for the neglect of duty, or illegal proceedings on the part of any special constable. The law fixing this liability would, in legal effect, become a part of the terms of the bond itself, whether written therein in express terms or not. The obligation on the part of a surety to a justice of the peace to respond in damages to one who has been injured by the misconduct and illegal acts of a special constable would, therefore, arise out of the bond on which he is surety, and the liability of his principal, the justice of the peace, would be of the same nature.

In reaching this conclusion we are supported by the authority of *Dummick v. Howitt*, 40 O. S., 646, where it was held:

“Under a bond given by a justice of the peace conditioned as required by Section 579 of the Revised Statutes, the sureties are liable for any neglect of duty or any illegal proceedings on the part of a constable appointed by said justice under Section 6685, by virtue of Section 6687.”

The liability of the plaintiffs in error to answer for the wrongful acts of the special constable is founded on the official bond, given by one of them as principal and the other as surety, and the petition itself shows that the bond is made the basis of the action. Section 11226, General Code, therefore, fixes the time within which the action must be brought, which is ten years, and since that time had not elapsed when the action was started, the claim sued upon was not barred, and the court below committed no error in so deciding.

We find no error in any of the other matters complained of in the petition in error, and the judgment of the court of common pleas is affirmed.

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**SUBMISSION OF REQUESTS TO CHARGE AS AN ENTIRETY.**

Circuit Court of Cuyahoga County.

THE SCHATZINGER CONSOLIDATED REALTY COMPANY v. E. M.  
STONEHILL ET AL.

Decided, February 5, 1912.

*Damages for Breach of Land Contract—Special Damages—Request to  
Charge Before Argument Presented as Series.*

1. Where a series of requests to charge before argument is properly presented, but the submission of them is as an entirety, or as a series, if one or more of the requests does not correctly state the law applicable to the facts submitted to the jury, it is not error to refuse to give the entire series.
2. When special damages are alleged to have resulted from the breach of a contract to convey lands, the plaintiff is entitled to a charge sufficiently comprehensive to enable him to recover such damages as arose naturally and proximately from the breach of the contract and such as the parties to the contract at the time it was made must reasonably have contemplated as a probable result of the breach.
3. In an action for the breach of a land contract, plaintiff is not entitled to compensation for expenditures made before the contract was entered into, looking towards its consummation.

*P. G. Kassulker*, for plaintiff in error.

*White & Grossner*, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The order of the parties to this proceeding was reversed in the court of common pleas. When the terms "plaintiff" and "defendant" are used reference is made to the parties as they stood in the original action.

The plaintiffs' amended petition filed in the court below sets up a cause of action for damages for breach of a parol contract for the sale of certain real estate in the city of Cleveland, possession of which, it is claimed, had been given to them by the defendant pursuant to such parol agreement.

It is urged that there was error in the refusal of the trial court to grant the defendant's motion to direct a verdict in its behalf and to arrest the testimony and evidence from the jury.

In support of this position, the defendant contends that while the contract sued upon in the amended petition is averred to be a parol contract, the evidence discloses a contract in writing with parol modifications, and that the plaintiffs therefore failed to prove the contract declared upon.

The writing which the defendant claims constituted the contract between the parties was offered in evidence, and an inspection of this writing discloses a written application signed by one of the plaintiffs, in which he applies to the defendant for the purchase of the real estate in question upon certain terms that are specified in the writing. There was a conflict of the evidence as to whether or not this constituted the contract which was entered into by the parties, or whether the contract actually entered into was a parol contract, and the question was properly submitted to the jury under adequate instructions from the court, to say what the contract between the plaintiffs and defendant in fact was, and we find no error in the action of the trial court in refusing to direct a verdict for the defendant.

It is also contended that the court below committed error in refusing to instruct the jury before argument, as requested by the defendant. After the plaintiffs and defendant had rested, and before argument, the defendant submitted to the court eight requests to charge. These requests were written on separate sheets of paper and separately numbered. The court refused to give these requests on the ground that the defendant had not complied with the statute, Section 11447 of the General Code, which provides that "When the evidence is concluded, either party may present written instructions to the court on matters of law, and request them to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced." Some of these separate propositions of law were correct and applicable to the facts in issue; others were not. The manner in which the request was made indicates that the court considered that the defendant had asked to have the eight different requests to charge before argu-

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ment given as an entirety and not separately. In this view of the matter, the trial court was justified in refusing to comply with the request made. While the position of the court was perhaps somewhat technical, we are of the opinion that the position assumed was not erroneous, since the charges to be given before argument must be given as submitted without modification, or entirely refused. If any one of the requests submitted to be given as an entirety, or as a series did not correctly state the law applicable to the facts submitted to the jury, they should all have been refused, and this is apparently the view of the court in the matter.

Another ground of error is said to exist because of the rule adopted by the trial court for the measure of damages, the defendant contending that the court misconceived the proper measure of damages to be applied to the facts in the case should the jury find for the plaintiffs.

The question of what was the true measure of damages to be adopted was raised by objection to the introduction of evidence in support of certain items of damage claimed by the plaintiffs, by exceptions to the instructions of the court on this subject, and by the refusal of the court to give certain instructions requested by the defendant in which a different rule was set forth than that adopted by the court. To determine what damages the plaintiffs were entitled to have awarded them by the jury, if the verdict should be in their favor, a brief reference to the facts will be necessary.

The plaintiffs, in their second amended petition, allege that the contract on which their action was founded was entered into on the 25th day of March, 1909, and that it was to be consummated upon the terms set forth on or before the 15th day of April, 1909. They further allege that they were to be given immediate possession of the premises purchased, and were to erect an apartment building thereon; that they paid to the defendant \$100 of the purchase price of the premises and entered into possession of the same; that they had plans and specifications prepared for the apartment building to be constructed on said premises; that they entered into contracts for

the construction of said apartment building and brought to the premises stone, brick and other materials, and made the necessary excavation for the building.

The evidence shows that the payment of \$100 was made by the plaintiffs to apply on the purchase price; that they entered into possession of the premises and did some work toward the erection of an apartment house on the premises; that on the 13th day of April, 1909, the premises claimed to have been bought by the plaintiffs were conveyed by the defendant to third parties. The right of the plaintiffs to take possession of the premises in question was denied by the defendant, but on this issue the verdict shows that the jury found with the plaintiffs.

The court instructed the jury on the measure of damages in this language:

"I say to you then, and you may apply the law as here given to the facts in this case, that where two parties have made a contract which one of them has broken, the damages which the other ought to receive for such breach should be such as may fairly and reasonably be construed as arising naturally, that is, according to the usual course of things from such breach of contract itself, or such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as a probable result of the breach of that contract. Now, if the special circumstances, if any such you find there were in this case, under which the contract was actually made if you find that such a contract was in fact made, if these special circumstances were known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known to each party and communicated to each other in the negotiations; but on the other hand, if these special circumstances, if any you find, were wholly unknown to the party breaking the contract, that would be the defendant in this case, if you find that he broke it, he could at the most be held only for such damages as would arise and flow naturally and proximately from such a breach of contract. The general principle of compensation is that it should be equal to the injury in every case."

The charge enlarged upon this general principle somewhat at length, and certain features of the charge will be referred to hereafter.

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There is much diversity among the authorities as to what the true measure of damages for breach of contract for the sale of real estate is. In an ordinary contract for the sale of real estate, where the vendor at the time of making the contract has title and afterwards refuses to convey, or puts it out of his power to do so by conveying the title to another, we believe the true rule of damages to be laid down in *Dustin v. Newcomer*, 8 Ohio, 50, which is as follows:

"When a vendor has a title and refuses to convey, or when he disables himself from conveying by parting with the title, the rule of damages to be enforced in equity is the value when the conveyance ought to have been made."

In *Sedgwick on Damages*, Section 1012, the subject is discussed in the language following:

"If the defendant fails to convey because he has not a good title, he is always liable in substantial damages. This is commonly called the United States Supreme Court rule, and represents one extreme of the series of principles of which the highest English court has adopted the other extreme. It seems to be the correct one on principle. It may be said in its favor that it is unjust to hold the vendee to his contract to pay, if, before the contract is to be performed, the land decreases in value, while if it increases in value, the vendor is liable only for nominal damages; that it is the object of courts of justice to carry out the contracts of the parties as far as possible, and that the specific act agreed to be done should be performed. If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing which he contracted to do; and such value to be estimated at the time when the act in question should have been executed."

It will be seen that the trial court did not, in express terms, charge according to the rule laid down in *Dustin v. Newcomer*, *supra*, but it will further be noticed that this action involved certain special circumstances. It was claimed by the plaintiffs that the premises involved were bought for the express purpose of building thereon an apartment house; that this fact was known to the defendant, and that the plans for such a building were discussed with the officers of the defendant, and that the defendant knew of the commencement of the work of building the

apartment. There was evidence tending to support the plaintiffs' claim in this respect, and the jury would have been justified in finding that the special purposes to which it is claimed the real estate was to be devoted were in contemplation of the parties at the time the contract was entered into, and that the defendant was aware of the steps taken by the plaintiffs to achieve these purposes. No evidence was introduced as to the value of the premises at the time the alleged contract was to be carried out, and we think that the plaintiffs were entitled to a charge sufficiently comprehensive to enable them to recover such damages as arose naturally and proximately from the breach of the contract, and such as the parties to the contract must reasonably have contemplated as a probable result of the breach of that contract when it was made, in case the jury should find that there was a contract and that it had been broken by the defendant.

We think there was no error in the charge as given insofar as that portion of it hereinbefore quoted is concerned.

The court, however, during the progress of the trial, had admitted evidence in support of an item of damages claimed by the plaintiffs amounting to \$275 for certain plans for the proposed apartment house, which were obtained by the plaintiffs while the negotiations for the purchase of the premises were being carried on. It appears that the obligation to pay this \$275 had been incurred before the contract claimed by the plaintiffs to have been made, had been entered into. The court in its charge used language authorizing the jury to take into account this item incurred for the plans and specifications. In the admission of evidence in support of this item of damages, and in instructing the jury that they might consider this in assessing the damages, if they should find for the plaintiffs, we think the court erred. The plaintiffs were not entitled to recover any damages for any expenditures made by them looking toward the consummation of the contract, and the argument that such expenditures have proved useless expenses by reason of the breach of the contract is of no avail. *Sedwick on Damages*, Section 1017.

The jury returned a verdict for the plaintiffs for \$1,200. The evidence submitted to the jury tended to establish items of dam-

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age suffered by the plaintiffs in addition to the \$275 item already referred to, in the following amounts: \$85 paid to the architect for services rendered after the contract claimed to have been entered into was made; \$119.20 paid to the contractor who was given the contract under which the work on the apartment house was done; \$150 also paid to this contractor, and another amount of \$41 paid to him; \$100 on the payment of the purchase price on which interest amounting to \$14.82 might and doubtless was figured by the jury. If all of these various amounts, including the \$275, are added together, it will be seen that the aggregate is \$785.02. The remainder of the verdict, amounting to \$414.98, if arrived at in view of any evidence submitted at all, must have been allowed on the basis of compensation to the plaintiffs for the time spent by them in preparing to build the apartment house which they designed to erect on the premises, and in carrying out such work as was done before the controversy arose. There was no evidence given as to the value of this time or the value of this class of services, although there was evidence bearing on what was done by the plaintiffs and the amount of time spent by them.

It is doubtful whether, under the charge of the court, the jury could have understood what rule they were to follow in making allowance, if at all, for this particular part of the plaintiff's damages. Under proper instructions they would have been justified in making some allowance, but the amount of \$414.09 under any possible instructions, in the light of the evidence introduced on this subject, seems to be excessive, and it is our opinion that \$100 would be a liberal allowance for this particular part of the plaintiff's damages.

As we view the matter, therefore, the erroneous admission of evidence in support of expenditures made previous to the entering into the contract between the plaintiffs and the defendant, and made for the express purpose of trying to secure such a contract, coupled with the erroneous features of the charge to which we have referred, is responsible for a verdict of \$589.98 in excess of what, under proper instructions, the jury might properly have assessed as damages.

We find no errors assigned by the petition in error to exist other than those to which we have called attention and if the plaintiffs will consent to remit from their verdict the sum of \$589.98, the judgment of the court below will be affirmed; but if they do not so consent, the judgment will be reversed and the cause remanded for further proceedings, for error in the admission of evidence and in the charge of the court.

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**DUTY OF MOTORMEN AT STREET CROSSINGS.**

Circuit Court of Cuyahoga County.

**ANGELA M. HARRIS V. THE CLEVELAND ELECTRIC RAILWAY  
COMPANY.**

Decided, February 5, 1912.

*Street Railway Crossing—Rights of Public—Motorman's Duty—Run-  
away Horse.*

1. A street car company has only equal rights with the driver of a horse, or a pedestrian, at a street crossing, and therefore it is the duty of the motorman as he approaches a street crossing, to have his car under control and to keep a constant lookout, not only ahead, but also to the right and left, so as to discover persons upon the track or approaching it without noticing or heeding the approaching car, so that he may allow them to pass over in safety.
2. A motorman can excuse himself for not seeing a person in danger at a crossing when in the exercise of proper care he ought to have seen him, only by showing that at the moment, his attention was attracted by some other matter in the line of his duty.
3. Although plaintiff's horse was running away and she could not control it, yet if the motorman saw her and could have slowed up sufficiently to let her pass, it was his duty to do so, and if he failed in this duty, that failure was the proximate cause of the accident.

*A. Lawrence and H. F. Payer, for plaintiff in error.  
Squire, Sanders & Dempsey, contra.*

**WINCH, J.; MARVIN, J., and NIMAN, J., concur.**

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This was a personal injury damage case, verdict for the defendant being directed at the close of plaintiff's evidence.

The accident happened at the junction of Riverside avenue with Detroit avenue, in the city of Lakewood, toward the close of the afternoon of the 12th day of October, 1906. The plaintiff was driving northerly on Riverside avenue, when her horse became unmanageable and ran away with her. As she approached Detroit avenue she saw a car of the defendant company approaching from the east at a high rate of speed and realized that she was apt to be struck by it, unless it slackened its speed. She held tightly onto the lines and managed to turn her horse toward the west at the corner and had got about fifteen or twenty feet from the corner when the car struck both the horse and buggy on their right side and she was thrown out and seriously injured.

There was evidence tending to show that there was a view across the corner from a point on Detroit avenue 250 feet east of Riverside avenue to a point on Riverside avenue 150 feet south of Detroit avenue, unobstructed except by a small office building directly at the corner.

The plaintiff testified:

"I could see the Detroit avenue car approaching, and I screamed to warn the motorman that I could not help myself, I first saw the Detroit avenue car when I was about one hundred and fifty feet from the corner. The car was about two hundred and fifty feet away, if not more. There was nothing by which my view was obstructed. I looked at the motorman in charge of the car, and he was looking at me. I could see across the corner there. He was facing towards me. I tried to hold my horse and I could not, so I tried to warn the motorman of my condition so that he would give me time to pass. I tried to stop the horse and when I could not, of course, the only place for me to turn was west. I turned the corner just as sharp as I could, say about fifteen or twenty feet, when the car struck me."

Two passengers on the car testified that at a point 200 feet before the car reached Riverside avenue they saw the horse running away and unmanageable, when it was at a point 150 feet south of Detroit avenue. One of them rang the bell when the car was 100 feet from Riverside avenue, but the motorman did

not slacken the speed of the car, which was running at a rate of from twenty-five to thirty miles an hour.

There was no evidence introduced to show within what distance a car running at that rate of speed might be stopped.

The plaintiff claimed that the accident was due to the excessive rate of speed at which the car was running, the neglect of the motorman to have it under control as he approached the crossing and his negligence in not noticing her danger in time to save her.

It is said that the trial judge took the case from the jury because he thought the running away of the horse and not the high rate of speed and negligence of the motorman, was the proximate cause of the injury.

It is well settled law, in this state at least, that a street car company has only equal rights with the driver of a horse, or a pedestrian, at a street crossing, and therefore it is the duty of the motorman as he approaches a street crossing, to have his car under control and to keep a constant lookout, not only ahead, but also to the right and left so as to discover persons upon the track or approaching it without noticing or heeding the approaching car, so that he may allow them to pass over in safety.

Thus, it was held in the case of *The Toledo Street Railway Company v. Westenhuber*, 22 C. C., 67, that:

"It is negligence in the motorman of an electric street car, when the car is from 150 to 200 feet from a street crossing and he sees a wagon about to cross the track, not to try to stop or slacken the speed of the car until almost at the crossing when, by so doing, the collision which ensued might have been avoided."

This case was affirmed by the Supreme Court without report in 65 O. S., 567.

In the same case it was said:

"If the driver could go upon and move more than half over the crossing before the arrival of the car, when the car was going at full speed, obviously the car might have been controlled by the motorman, so that the driver could have passed entirely over without a collision."

So here, though there was no evidence as to the distance within which a car going at the rate of twenty-five to thirty miles an

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hour could be *stopped*, yet, as the horse got fifteen to twenty feet to the west of the crossing before the car struck the front wheel of the buggy, *obviously* the collision would not have occurred if the motorman had slowed up his speed the least appreciable amount. It took no expert testimony to advise the jury of this fact. Any person of ordinary intelligence can figure it out.

While there was evidence introduced by the plaintiff showing that the motorman *actually* saw her and her danger in plenty of time to avert the collision, for she says she saw him looking at her, still it would be sufficient if her evidence merely tended to prove that, in the exercise of care commensurate to the occasion, *he ought* to have seen her, and the evidence of the two passengers, as well as her own tends to prove that.

The rule, as understood and several times applied by this court, is that the motorman can excuse himself for not seeing the person in danger at a crossing when, in the exercise of proper care he ought to have seen him, only by showing that at the moment, his attention was attracted by some other matter in the line of his duty.

It would seem, therefore, that the plaintiff introduced evidence tending to show negligence on the part of the motorman. Was that negligence the proximate cause of the accident?

Although the plaintiff's horse was running away, and she could not control it, the collision was not inevitable if the motorman saw her and could have slowed up sufficiently to let her pass. It was then his duty to slow up, and if he failed in this duty, that failure of duty would be the proximate cause of the accident.

The same is true though he did not see her, if, under the circumstances, in the performance of his duty to keep a lookout, he failed to see what he ought to have seen.

So, too, his negligence is not less, but greater, if his car was running at an excessive rate of speed and was not under control.

As tending to show that a speed of from twenty-five to thirty miles an hour is excessive speed at this place, the ordinance of the city of Lakewood, limiting the speed of such cars to eighteen miles an hour, was introduced. This was some evidence to be

considered in determining the defendant's liability. "It served to give character to the act causing the injury." *Meek v. Pennsylvania Co.*, 38 O. S., 638.

There was sufficient evidence in this case to go to the jury and put the defendant upon its defense.

For error in directing a verdict for the defendant, the judgment is reversed and the cause remanded for further proceedings.

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**PROHIBITION AGAINST LIQUOR TRAFFIC IN RESIDENCE DISTRICT.**

Circuit Court of Cuyahoga County.

IN RE PETITION AGAINST PROHIBITING THE SALE OF  
INTOXICATING LIQUORS IN A CERTAIN RESIDENCE  
DISTRICT IN THE CITY OF CLEVELAND.

Decided, February 5, 1912.

*Local Option—Residence District—Part Again Petitioned Dry—Balance Can Not Become Wet.*

Under Section 6142, General Code, a wet petition can only be filed and allowed for the same residence district previously petitioned dry; hence, if meanwhile part of the district has been cut off and added to another dry district the balance of the district can not become wet.

*A. W. Lamson, C. M. Earhart and G. E. Hartshorn, for plaintiffs.*

*E. K. Wilcox and Geo. W. Shaw, contra.*

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

In this case we are called upon to review the decision of the mayor of Cleveland holding a wet petition, so-called, sufficient and permitting the sale of liquor in certain territory which, more than two years before had been petitioned dry.

The petition held sufficient by the mayor was filed April 3, 1911, under the provisions of Section 6142 of the General Code, which says that:

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"When a majority of the qualified electors of a residence district of a municipal corporation in which the sale of intoxicating liquors as a beverage has been prohibited under the provisions of the next two preceding sections, sign a petition against prohibiting the sale of intoxicating liquors as a beverage *in the same residence district* and file such petition with the mayor of the municipal corporation or with a judge of the court of common pleas in the county, such mayor or judge shall examine the petition at a public hearing and decide upon the sufficiency thereof, and cause a copy of his decision to be filed with the clerk of the municipal corporation or council. Such petition shall not be filed until after two years or more have elapsed after the filing of the petition provided for in section sixty-one hundred and forty."

The petition filed April 3, 1911, was in all respects regular and in conformity to the law, and was properly held sufficient, unless defeated by proceedings subsequently brought, under another section of the statutes, for that specific purpose.

Under favor of Section 6157, which provides that, "At any time after two years from the filing of a petition under sections sixty-one hundred and forty and sixty-one hundred and forty one, another petition may be filed under the provisions of such sections, covering part or all of the territory included in the first petition, with or without other contiguous territory," another petition was filed on April 13, 1911, with one of the judges of the common pleas court of Cuyahoga county, in which the city of Cleveland is situated, and this petition covered the northerly one-third of the territory described in the first petition and much more contiguous territory to the north of it, and prayed that the territory therein described be made dry.

This dry petition applied to territory containing a greater number of resident electors than the wet petition filed with the mayor, and covered territory common to both. At the time it was filed with the judge, the mayor had not passed upon the wet petition filed with him.

Such proceedings were had on the dry petition filed with the judge that it was later held sufficient by him, and thereafter the mayor made the ruling on the wet petition which is here under review.

Section 6145 provides:

“When there are pending two or more petitions under the next five preceding sections, including territory common to all, that petition shall have precedence which applies to the territory containing the greatest number of resident electors,” etc.

The plaintiff reading of this section entitled the dry petition before the judge to be heard before the wet petition was heard by the mayor, for they were both pending at the same time, they included territory common to both, and the dry petition applied to territory containing the greater number of resident electors.

The dry petition was first heard and held sufficient, and thereby the wet petition was displaced and rendered obsolete. It was error, therefore, for the mayor to thereafter allow the wet petition; it had, by operation of law, become of no validity, for part of the territory covered by it had meanwhile been cut off and made dry, and under section 6142, a wet petition can only be filed and allowed for the *same residence district* previously petitioned dry. It was no longer the *same*.

It is claimed that this construction of the statutes, produces an unjust result; fosters political trickery; disfranchises the electors in the southern two-thirds of the original dry territory, so far as the liquor question is concerned; brings about a process of “shingling” so-called, on the part of the drys; that is, enables them, by taking a very small portion of a district once petitioned dry and including it with other contiguous territory, to destroy the autonomy of the original district and prevent the remaining and greater portion of it from ever becoming wet again.

This argument should be addressed to the Legislature and not to the court. An amendment to Section 6157, giving the wets and the drys equal privileges in forming new districts, would be more fair, if the question of fairness is to be considered.

Under the Constitution however, it seems that the Legislature has plenary powers in the regulation of the liquor traffic, and can wholly prohibit the traffic if it desires to do so. Any injustice in the exercise of these powers by the Legislature, can not be remedied by the courts.

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The order complained of was contrary to law and is reversed, and, on the conceded facts, the petition is dis-allowed.

### ACTION FOR RECOVERY OF UNPAID STOCK SUBSCRIPTIONS.

Circuit Court of Cuyahoga County.

CHARLES W. SMITH V. UNION SAVINGS & BANKING COMPANY  
ET AL.

Decided, January 29, 1912.

*Joinder of Causes of Action—Summons to Another County for Defendant Improperly Joined—Summons Quashed.*

To a cause of action brought by a stockholder for the collection of unpaid subscriptions to stock, said cause of action purporting to be for the benefit of the corporation, its creditors and all its stockholders, there can not be joined a cause of action in favor of the plaintiff as an individual against a resident of another county, for fraud in inducing plaintiff to buy his own stock. Summons in such case on the resident of another county will be set aside and quashed.

A. E. McKisson, for plaintiff in error.  
Stearns, Chamberlain & Royan, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

The question in this case is whether service upon the defendant, the New First National Bank of Columbus, Ohio, was properly set aside and the summons quashed by the common pleas court.

A determination of this question requires an examination of the issues tendered by the pleadings, for if the action is for money only, Section 11281 of the General Code was not complied with, there being no indorsement on the summons of the amount claimed in the petition for which judgment was asked; and, if said defendant was not a necessary party to a complete determination of the case, the plaintiff was not entitled to have a summons issued to any other county, under the provisions of Section 11282 of the General Code.

The petition purports to set forth a cause of action in favor of a stockholder of a corporation for the collection of unpaid subscriptions to stock.

It sets forth that various defendants, among them one E. W. Christy, subscribed for various numbers of shares in the Union Savings & Banking Company, a corporation under the laws of Ohio, with its principal office and place of business in the city of Collinwood, Cuyahoga county, Ohio, for which shares said defendants agreed to pay, respectively, the sum of \$100 per share; that without payment of said subscriptions, the company caused certificates to be issued to said subscribers representing that each had paid fifty per cent of the face value of his shares, whereas, in fact, they had made no payments therefor; that the company had failed, became insolvent and was in the hands of a receiver who was administering the assets of the company for the benefit of the creditors. That the assets in the hands of the receiver were wholly insufficient to pay its liabilities, which were so large that it would require the payment by all the stockholders, including the plaintiff, of their entire unpaid subscriptions to liquidate said liabilities. That the directors of the corporation had refused to make calls for the payment of said subscriptions, and that the receiver had refused to take any steps to collect the same.

The plaintiff alleges that he brings his action for the benefit of the creditors of the corporation, and his prayer is that the court ascertain who are the owners, legal and equitable of its stock, and require them severally to pay the unpaid subscriptions on their stock, the fund thus obtained to be administered for the benefit of the corporation.

Passing no opinion upon the sufficiency of this petition, it is clear that though the petition asks a money judgment against the defendant stockholders, still the action attempted to be set up is one which requires the exercise of equity jurisdiction, for the plaintiff does not ask a money judgment in his own behalf, but only the incidental relief of having payment made of the debts of a corporation, in which he is a stockholder.

In this respect the case at bar is distinguishable from the case of *Smith, Receiver, v. Johnson*, 57 O. S., 486, where the action

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was brought by a receiver, who had succeeded to the rights of the corporation, and was held entitled to maintain an action at law to collect unpaid subscriptions. The distinction here applied is mentioned by Judge Spear on page 488 of the opinion in the case cited.

This does not settle the question, however, for the New First National Bank was not made a defendant to the original petition, but was brought in by a subsequent pleading.

The plaintiff, some time after the case began, filed what he denominates an answer and cross-petition, making one Charles W. Loomis and the New First National Bank of Columbus, Franklin county, Ohio, parties defendant in the cause, and it is on this pleading that the summons, subsequently quashed, was issued for said bank.

Adopting in this pleading the allegations of his petition, as he says, "so far as the same may be necessary," the pleader proceeds to set forth that some 250 shares of the stock of the Union Savings & Banking Company was issued without payment therefor, to the defendant E. W. Christy, that said stock was acquired by himself and said Charles W. Loomis; that at the time they acquired said stock, "said C. W. Loomis, in common with the officers and agents of said national bank, represented and said that all of the face value of said stock had been paid in full, and that there was nothing due and unpaid thereon; that said banking company was in a flourishing condition and making money; that said stock was worth par; that it was 'as good as wheat;' that said banking company was solvent and making money, in order to induce this cross-petitioner to purchase a one-half interest in said capital stock and pay for the same."

Then follow allegations as to the falsity of said representations, that Loomis and the officers and agents of the national bank knew said representations were false when they made them; that plaintiff relied upon said representations, etc. In fine, the plaintiff, if he makes out any case at all against said national bank, sets forth one which would entitle him to damages for the alleged fraud committed by said national bank, when he purchased said one-half interest in said 250 shares of stock.

There is no allegation in this pleading that the national bank was ever the owner of said 250 shares of stock.

The prayer of the pleading is that:

"Charles W. Loomis and the New First National Bank of Columbus, Ohio, may be found to be jointly and severally liable on the unpaid balance of the \$25,000 of capital stock of the Union Savings & Banking Company, a one-half interest in which was originally sold to this cross-petitioner as aforesaid; and further, that whatever judgment may be found due on the said \$25,000 of stock be first ordered to be paid by said Charles W. Loomis and said the New First National Bank of Columbus, Ohio, either severally or jointly as aforesaid; and for such other and further relief by reason of the premises as the nature of this case may require."

In other words, the pleader asks that the national bank be compelled to pay what he himself, as assignee and transferee of the stock, is liable for, under Section 8674 of the General Code, because said national bank by fraud induced him to buy said stock.

This issue has no connection with the issues raised by the petition or the relief prayed for therein. It is a personal right claimed to exist in favor of Smith, an individual, and not for the benefit of the creditors of the corporation for whom he brought the original action. The creditors might, perhaps, hold a former owner of the stock, if Smith were insolvent, but there is neither an allegation of Smith's insolvency nor that the national bank was a former owner of the stock. The plaintiff can not inject this independent cause of action against a resident of Franklin county into a case pending in Cuyahoga county with which it has no connection, and thus obtain a right to have summons issued in Franklin county.

The action outlined in said cross-petition was not rightly brought in Cuyahoga county, within the purview of Section 11282, General Code, and so summons on it could not issue to any other county.

It follows that service of summons in Franklin county was properly set aside, and the judgment of the common pleas court is affirmed.

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**INJUNCTION AGAINST CONSTRUCTION OF LEVEE DENIED.**

Court of Appeals for Coshocton County.

**MATHEW CRAWFORD v. JOHN I. MILLER, ROSS HAMILTON, GILBERT J. MCKEE AND THE COUNTY COMMISSIONERS OF COSHOCTON COUNTY, OHIO.**

Decided, March, 1914.

*Water and Water-Courses—Means for Protection Against Floods—Right of State to Construct Levee—County May Join in the Work—Property Owner, Fearing Damage to His Lands, Has Adequate Remedy at Law—County Commissioners Joint Tort Feasors—Sections 455, 457, 458, 459 and 7483, General Code.*

1. Under favor of Section 7483, county commissioners have the right to join with state officers in the construction of a levee for the protection of state property from damage from floods, where by so doing they are able to accommodate the public by protecting a county road from overflow and injury.
2. A property owner whose lands will probably be damaged by the construction of such a levee has an adequate remedy at law against the county commissioners, who in such a case would be joint tort feasors; and injunction does not lie upon the petition of such land owner against proceeding with the work.

Appeal from Court of Common Pleas.

*Thomas H. Wheeler and James Glenn, for plaintiff.*

*Timothy S. Hogan, Attorney-General, W. J. Wieland, Joseph L. McDowell and George D. Klein, Prosecuting Attorney, cited on behalf of the defendants:*

(1) That plaintiff has an adequate remedy at law; *Hosher v. County Commissioners*, 14 C.C.(N.S.), 198; 50 Ohio St., 628; 76 Ohio St., 529; 32 Ohio St., 414; Section 2408, G. C.; 38 Cyc., 485, 590; *Rice v. Collidge*, 121 Mass., 393; *Taylor Water Co. v. Dillard*, 9 Tex. Civ. App., 667; *Pickerill v. City of Louisville*, 125 Ky., 213; *McGarry v. West Chicago Street Ry.*, 85 Ill., 610; *St. Louis Bridge Co. v. Niller*, 138 Ill., 476; *Humphreys v. Union Springs R. R. Co.*, 65 S. E., 1051; *Richmond v. Gallage Mills Co.*, 102 Va., 165; *Brown v. City of Webster*, 115 Iowa, 511;

Article I, Section 19 of the Ohio Constitution; *Green v. State*, 73 Cal., 29; *Simonson v. Richardson*, 2 N.P.(N.S.), 170.

(2) Injunction does not lie: Section 22, *High on Injunction* (4 Ed.); *Spangler v. City of Cleveland*, 43 Ohio St., 526; *Cincinnati v. Bowman*, 1 Handy, 246; *Potter v. Schneck*, 1 Biss. (U. S. C. C.), 515; *Batsch v. Kinsinger Iron Co.*, 15 Ohio Dec., 30; *Turnpike Co. v. Commissioners*, 7 Ohio Dec., 509; *Attorney-General v. Perkins*, 2 Dev. Eq. (N. C.), 58; *Hall v. Reed*, 40 Mich., 46; *Bigelow v. Hartford Bridge Co.*, 14 Conn., 565; *Ruge v. Apalachicola Oyster Co.*, 25 Fla., 656; *C. & D. Ry. Co. v. Canal Co.*, 1 C.C.(N.S.), 146; *Crawford v. Rambo*, 44 Ohio St., 279; *Cooper v. Hall*, 5 Ohio, 320; *McElroy v. Coble*, 6 Ohio, 187.

(3) Defendants are required to anticipate ordinary and not extraordinary floods: *Crawford v. Rambo*, 44 Ohio St., 279; *Welty v. Vulgamore*, 1 C.C.(N.S.), 553; *Farnham on Waters and Water Rights*, 361; *Bryston Hydraulic Co. v. Boyer*, 67 Ind., 236; *City of Madison v. Boss*, 3 Ind., 236; *Eagan v. Central Vt. Ry.*, 81 Vt., 141; *Cooper v. Williams*, 4 Ohio, 253; *Phila., W. & B. Ry. v. Davis*, 11 Atl., 822.

This action was brought by the plaintiff against the above named defendants, to obtain a temporary restraining order restraining the defendants and each of them from building, erecting or constructing a levee as described in the petition, until the final hearing of this cause, and upon the final hearing a perpetual injunction be granted as prayed for in the petition.

The plaintiff alleges that he is the owner of the real estate described in the petition; that the lands are farming lands of great value and adapted to the growing of corn, wheat, grass and other farm crops.

The defendant, Gilbert J. McKee, is the owner and in possession of the land described in said petition, and which land adjoins the lands of said plaintiff on the east and border on the Walhonding river hereinafter mentioned.

Plaintiff further avers that his said lands are bounded on the east by the land of said Gilbert J. McKee and on the south by the Walhonding river and Walhonding canal, which canal was abandoned by the state of Ohio about the year 1896.

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The defendants, Henry Clark, J. C. Crile and J. H. Elder, are the duly qualified and acting county commissioners of Coshocton county, Ohio.

The said Walhonding river has an uninterrupted flow along its natural watercourse except for a dam in said river heretofore constructed and maintained by the state of Ohio and the department of public works of said state of Ohio. Said dam is known as the Six Mile Dam in said Walhonding river. The abutments erected at each end of said dam as a protection and support therefor are several feet higher than the top of said dam, to-wit, about 12 feet, and the plaintiff's said land lies north and west of said dam; and said river flows in an easterly direction along said plaintiff's said land. The defendants, John I. Miller, as superintendent of the department of public works of the state of Ohio, and Ross Hamilton as superintendent of the construction of a certain levy, as officers of the department of public works of the state of Ohio, and Henry Clark, J. C. Crile and J. H. Elder, as commissioners of the county of Coshocton, Ohio, threaten and are about to erect and will build and construct a levy from the north abutment of said dam in a northwesterly direction across the lands of the said Gilbert J. McKee to a point on the southeast corner of the lands of said plaintiff, and will so construct said levee unless restrained by this court. Said levee so to be constructed by said defendants will extend to a height of four and three-tenths feet above the plaintiff's said lands at its lowest point; in case of a flood or sudden rise of the waters of said river it will cause said river or a part thereof to overflow plaintiff's said land before the same will flow over the levee erected by said defendants, and said levee will obstruct the natural flood channel of said river and cause said river to flow in a new and different flood channel on and over the lands of the plaintiff; that said defendants in constructing said levee are doing so without due process of law, without any license, sufferance, consent or agreement, contract or grant with or from the plaintiff, who is the owner in fee simple of said premises; and said defendants are so threatening to overflow and prepare said new flood channel without securing the right so to do by any process of law, and

without making or paying to the owner thereof any compensation therefor by placing on it in the event of a flood in said river the burden of furnishing a channel for said flood water to pass through and over the land of said plaintiff, without said construction of said levee, which will improve the natural regular flow of said flood water, the land of the plaintiff would not be subject to said burden. A large part of said premises that are now well suited for the growing of said crops and which is and for a long time has been used therefor at great profit to the plaintiff, will by the erection of said levee be overflowed by the waters of said river and rendered unfit for growing corn, wheat, grass and other crops, and render said premises worthless for farm purposes; that the waters flow on in their natural course over the depression where defendants threaten to construct said levee, it spreads out over a large tract of one-half mile in width and again returns to the channel of said river without overflowing the lands of plaintiff; that said levee is permanent in its character and will obstruct the flow of the flood waters of said river in its natural flood channel and cause said waters to flow on and over said premises of plaintiff, to the irreparable damage of plaintiff: and plaintiff has no adequate remedy at law for the wrongs herein complained of.

The plaintiff prays that a temporary restraining order be allowed, etc., and upon the final hearing a perpetual injunction be granted, etc. A temporary restraining order was granted by the probate judge of Coshocton as prayed for. Motion by defendants to the common pleas court to dissolve and set aside said temporary restraining order was granted and the plaintiff appeals to this court. Thereupon the defendants, the county commissioners of said Coshocton county, filed their answer in which they say in substance that they admit that plaintiff is the owner of the lands described in the petition; that a part of the Walhonding canal was abandoned as alleged in the petition; that they, Henry Clark, J. C. Crile and J. H. Elder, are the duly elected, qualified and acting commissioners of Coshocton county, Ohio. They further admit that a dam has been constructed and maintained by the state of Ohio as alleged in said petition, and they deny each and every other allegation.

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Said commissioners further answering say that they have entered upon their journal an entry to the effect that one thousand dollars be paid to the state of Ohio, and the state of Ohio is to take care of a right-of-way for the levee proposed to be constructed by the state of Ohio; that said one thousand dollars be paid when the levee is completed; that said participation in the construction of said levee is considered by the commissioners of public importance, and that if said levee is not constructed that portion of the highway leading from Warsaw to Coshocton and beginning on the Wilson lands and running south toward Coshocton will be greatly damaged. They ask that said action as to them may be dismissed and that they be permitted to carry out their part of the construction of said levee.

The defendants, J. I. Miller and Ross Hamilton, on October 13, 1913, filed their joint answer alleging in substance that they admit the ownership of the lands by the plaintiff described in the petition. They say that a part of the Walhonding canal was abandoned by act of the Legislature of the state of Ohio about the year 1896, and the remaining part of said canal is still maintained as a part of the public works of the state of Ohio. They admit that the said defendants, Clark, Crile and J. H. Elder, are the commissioners of Coshocton county; that the state of Ohio has constructed a dam in the Walhonding river in the vicinity of plaintiff's lands; that said dam is a part of the public works of the state of Ohio and is maintained to secure a supply of water for the Walhonding canal, which is owned and maintained by the state of Ohio; said dam has been constructed, used and maintained by the state of Ohio for such purposes for more than 21 years last past. They admit the abutments of said dam are several feet higher than the top of said dam. They deny each and every allegation in said petition not herein admitted to be true.

The defendant, John I. Miller, is the duly appointed, acting and qualified superintendent of the public works of Ohio, and as such superintendent has the charge and control of the maintenance and management of the dam mentioned in the petition: and as such superintendent as the agent of the state of Ohio and to protect and maintain said public works of Ohio, he is

proposing to construct, to repair a certain levy on the north bank of the Walhonding river extending from the north abutment of said dam in a northwest direction for a distance of about 1695 feet. In such construction said John I. Miller is not acting in his individual capacity but as an official of the state of Ohio and under direction and authority of the General Assembly and of the Constitution of the state of Ohio. Said defendant, Ross Hamilton, is in the employ of the state of Ohio as superintendent of the construction of said levee. Defendants say for more than twenty-one years last past the state of Ohio has constructed, used and maintained a levee as a part of the public works along the north shore of said Walhonding river from the north abutment of said dam in a northwesterly direction; that a part of this levee was destroyed and washed away by the extraordinary flood of March, 1913; that by reason of this damage of said flood to said levee a large amount of the property of the state of Ohio, a large part of the public roads of Coshoc-ton county, Ohio, and a large amount of farming lands situated north and northeasterly from said levee have been placed in jeopardy; that if this levee is not repaired before spring the property will be placed in danger and particularly by a sudden rise of the Walhonding river, which usually occurs in the spring months of each year, and said Walhonding river will ultimately cut a new channel through said farming land.

Defendants say that said proposed new levee proposed to be constructed is to be so placed that the new channel of said river at this point will be greatly widened and the width of said river will be at least doubled. That the top of the proposed levee and the top of the former levee are of about the same level. The defendants specifically deny that said proposed levy will cut off the flood channel of said river and cause said river to seek a new channel over plaintiff's lands.

Plaintiff has an adequate remedy at law. They say that the floods of March, 1913, caused a large amount of damage of the public works of the state of Ohio throughout the state; that the department of public works was taxed to its utmost capacity to make such repairs as were immediately necessary; that it was necessary to secure a specific appropriation of money from the

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Legislature to repair the levy herein mentioned; that the Legislature appropriated the sum of \$10,000 to repair said levee; that in order to estimate the amount of money needed measurements and surveys had to be made and were made; that after said appropriation was allowed it was necessary to make plans and specifications to reconstruct said levee and a complete survey of the ground was made; that after said plans and specifications were proposed and approved advertisements for bids were inserted in newspapers as required by law and bids received; that the bids so received were irregular and exceeded the appropriation and were rejected; that thereupon new bids were asked for and said bids also exceeded the appropriation and were therefore rejected.

Said measurements, sounding and surveys were made upon the land in question and were known to plaintiff and he made no objection thereto. Bids were advertised for in newspapers of general circulation in Coshocton county, Ohio, for said construction and it was generally known that said proposed levee was to be constructed, and plaintiff made no objection; that plaintiff has been guilty of laches and should not have the relief sought and prayed for in his petition.

The plaintiff files replies to the joint answer of the defendant, John I. Miller, and others, also to the answer of the county commissioners, but they are in the nature of denials to the affirmative allegations of the answer. The plaintiff files an amendment to his petition, but these additional pleadings do not raise any new issues, and this brief reference to the replies and amendment to the petition are sufficient to present the questions arising in the case.

The case was submitted to the common pleas court upon the pleadings, evidence and exhibits, resulting in a finding and judgment for the defendants, and the temporary restraining order theretofore granted was dissolved and the petition dismissed at the cost of plaintiff.

An appeal was taken by the plaintiff to the court of appeals of this county and the same is submitted to the court on the pleadings, evidence and exhibits at the November term of said court.

VOORHEES, J.; SHIELDS, J., and POWELL, J., concur.

This action is brought by the plaintiff against the county commissioners of Coshocton county and the representative of the state of Ohio, as superintendent of the department of public works of the state, and Ross Hamilton, as superintendent of the construction of the levee mentioned in the petition, to enjoin them from constructing said levee. The object of the suit is to enjoin said commissioners and said officers of the department of public works of the state from making the improvements mentioned and described in the petition.

To state the case more accurately, it is a suit against the state of Ohio and the county commissioners of Coshocton county, to enjoin them from improving and protecting the property of the state, and to enjoin the county commissioners from protecting some, or in protecting at least one, of the public highways of the county from danger and injury from flood waters in the Walbonding river.

At the very threshold of the investigation the first question that confronts us is, Can such a suit be maintained against the state or its officers? It will be conceded, no doubt, that the state can not be sued in an action of this kind. If the state does a wrong or commits an act in improving its property, such as its canals, the remedy is not by injunction. But under Section 455 of the act of the General Assembly of Ohio, passed March 5, 1913, and approved by the Governor March 19, 1913 (103 Ohio Laws, page 125), wherein it is provided:

"That when private property is injured by a break, leakage, overflow of a canal, slack water, pool, reservoir or other public work, or by the insufficiency or by the filling up of a culvert thereof, or by the washing away of earth caused by a dam under the control of the superintendent of public works, the owner of such property shall apply in writing to the superintendent of public works for damages within one year from the occurrence of the injury, but no such application shall be received after such period."

Sections 457, 458 and 459 of said act point out the proceeding and remedy secured to the property owner, which shows the remedy is not by injunction and that the owner of property

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claimed to be damaged has a remedy under the statute stated which gives him a complete and adequate remedy at law. If the state can not be sued, what effect has it in a case where there are joint tort feassors, one of whom can not be sued? Does it change the rule of law that, where there is not an adequate remedy at law, resort can be had in a court of equity by way of injunction to prevent an act being done that is claimed to be an invasion of the rights of the party complaining?

In this case the county commissioners have joined the authorities of the state in constructing the levee contemplated. Their reason for so doing is to protect one of the public highways of the county from injury from the flood waters of the Walhonding river at times of floods in the river.

The commissioners have the legal right to make levees or embankments to protect public highways. Section 7483 of the General Code provides when county commissioners shall build embankments, etc.:

“When a principal public road in a county, except a turnpike road over which tolls are collected, is subject to overflow or inundation so as to render it at any time unfit for public travel, or hinders free and necessary transportation, the commissioners of such county may repair or reconstruct said road by changing the beds of small streams to avoid crossing, changing roads to avoid bridges when the public travel would be better accommodated, or build an embankment or levee sufficiently elevated above all such overflows or inundations; the expense of such embankment, changes or levee shall be paid out of the money in the county treasury raised by taxation for road or bridge purposes.”

Under favor of this section of the General Code, we think the commissioners had the right to join the state officers in constructing the levee in question, if it would better accommodate public travel from the overflows or inundations of the same from the flood waters of said river.

The fact that the state can not be sued, may render the county liable for any damage to the private owner of lands who is damaged by the improvement; or if the state is exempt, this fact will not exempt the commissioners from liability to the party injured. If said improvement is wrongfully made by the

commissioners, or, in other words, the remedy at law is not destroyed by such condition, it is contended by the plaintiff that by constructing this levee as planned and intended by the state, assisted by the commissioners, it will and has interfered with the flow of the waters of said river, and by interfering with the natural flow thereof, the lands of plaintiff are and will be damaged, and to avoid such damage this action brought to restrain and enjoin the defendants from constructing or maintaining such levee or improvement.

The levee may not be in the nature of a permanent improvement, one that could not be removed if it were unlawfully constructed; neither is it a case where the damage to plaintiff's land, if any, is complete when the improvement is completed. It is not a case of injury that could not be abated by the removal of the levee. Then the question is presented, Is it such an action that the plaintiff would have an adequate remedy at law, under the act hereinbefore cited from Volume 103, Ohio Laws, Sections 455, 459 and 449?

The last section cited contemplates a trial by jury under certain conditions, but what right the plaintiff may have as to damages against the state for constructing this levee or whether he has any right to damages against the state the court is not called upon to decide. The question here presented is as to the right of the plaintiff to maintain a suit for injunction against either the state or the county commissioners restraining them from constructing the levee mentioned in the petition.

That a court can not and will not interpose to control the discretion of public officers in the absence of evidence of bad faith or corrupt and malicious motives is too well settled in Ohio to be controverted. We think the commissioners have the right to join with the state or to act alone in constructing this levee, acting in good faith for the purpose of protecting one of the public highways of the county. If it were necessary for the benefit of the public to construct this levee to protect the highway leading from Warsaw to Coshocton from the flood waters of the Walhonding river, the commissioners, under the section of the General Code above cited, have the right to do so. If by so doing the plaintiff should be damaged, the county may be liable

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and may be required to make him whole for whatever injury he has sustained by reason of the improvement. We think there is no question but the commissioners have the right to make or to join the state in constructing and maintaining this levee across the flood channel of the Wallhonding river at the place and in the manner proposed and intended by the officers of the state for the protection of the state's property, including the dam in the river, known as the Six Mile Dam, and if the commissioners believe the public highway described in their answer will be improved and benefited and protected from the flood waters, they have the right so to do, and they can not be enjoined from making the improvement or maintaining said levee.

We have been greatly aided in this discussion by the able and exhaustive brief of the Attorney-General and his assistants by giving the authorities cited therein touching the question involved in this action.

Without pursuing the discussion further, we are unanimous in the opinion that the plaintiff's action for an injunction or restraining order as prayed for can not be maintained, and we find the issues in favor of the defendants.

The petition of plaintiff is dismissed at his costs and if the temporary restraining order as heretofore allowed is still in force the same is dissolved.

**"JERKS" OF ELECTRIC CARS AN INCIDENT OF TRAVEL.**

Circuit Court for Hamilton County.

**THE CINCINNATI TRACTION COMPANY V. MARY BROGAN.**

Decided, February 8, 1913.

*Negligence—In the Operation of Electric Railway Cars—"Jerks" Where Not Due to Defects in the Track or Careless Operation Not Chargeable to the Company.*

Evidence of a "jerk" in the movement of an electric car does not establish negligence where not shown to have been due to a defect in the track or careless handling of the car, even though a witness described the jerk complained of as "terrible."

*Miller Outcalt*, for plaintiff in error.

*Kramer & Bettman*, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

We are of the opinion that the evidence in the above action does not establish negligence upon the part of plaintiff in error in the operation of its car at the time the accident complained of occurred.

"The mere fact that a car gives a sudden movement when starting or stopping, is entirely consistent with the supposition that it was managed in a careful and prudent manner and does not raise a presumption of negligence." *Booth on Street Railways*, Section 250.

"The possibility of an electric car giving a jerk is an incident of travel which every passenger must expect. To make out a case of negligence on the part of a defendant railway company in such a case the plaintiff must go further and introduce evidence that the jerk in question was due to a defect in the track or to the negligence in the operation of the car." *McGann v. Boston Elevated Railway*, 199 Mass., 446; *Railway Co. v. Osborn*, 66 O. S., 45; *Craig v. Boston Elevated Ry. Co.*, 93 N. E., 575.

The use of the adjectives, "terrible," etc., as descriptive of the kind of jerk were but conclusions of the witness.

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The trial court therefore erred in not granting the motions of plaintiff in error to direct a verdict in its behalf.

Judgment reversed and judgment for plaintiff in error will be entered in this court.

### LIABILITY FOR INJURIES RECEIVED IN AN ELEVATOR.

Circuit Court of Cuyahoga County.

JAMES FLYNN v. SALINA WILTSHIRE.\*

Decided, February 5, 1912.

*Landlord and Tenant—Owner Liable for Faulty Original Construction—Also When Control Retained—Variance.*

1. When an elevator accident occurs as the result of original faulty construction the owner of the building may be liable, though he has leased the building to a tenant.
2. Where a landlord under his lease to a tenant retains control of an elevator and agrees to keep it in proper condition, he is liable for an accident resulting from the elevator getting out of repair.
3. Where it can be done without surprise or injury, a case should be tried upon the evidence and if objection be made that evidence is not admissible under the pleadings, the pleadings should be amended at once and without terms.
4. Where there has been a variance between pleadings and proof, and no amendment of the pleadings to conform to the facts proved has been asked, ordered or made, the judgment will not be reversed unless it appear that by the variance the plaintiff in error was misled to his prejudice.

*Reed, Russell & Eichelberger, for plaintiff in error.*

*F. C. Scott, contra.*

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

This was an action brought by defendant in error to recover for personal injuries received in an elevator accident in a build-

\*Dismissed in the Supreme Court, March 25, 1913, on motion of plaintiff in error at his costs.

ing owned by James Flynn, plaintiff in error, and leased to the Flynn-Froelk Company, which was a defendant below, but is not a party to these proceedings in error.

It is doubtful if this court has such jurisdiction of the subject-matter of the case as will authorize it to review the judgment, for want of necessary parties. *Jones v. Marsh*, 30 O. S., 20.

However, we have examined the several assignments of error and give our views regarding them.

It is claimed that the petition made no allegation of negligence against James Flynn, merely stating that he was the owner of the building and that he had leased it to the Flynn-Froelk Company, who were in possession of the building, and consequently, of the elevator; that there is no allegation that Flynn retained any control over the elevator and that, therefore, under the adjudications in Ohio, no case was stated against him.

With this view we do not concur; the petition is susceptible of the interpretation that the accident happened because of original faulty construction for which the owner would be liable, so that it complies with the rule stated in the third paragraph of the syllabus of the case of *Shindelback v. Moon*, 32 O. S., 264, and sets forth a case such as is referred to in the last paragraph of the opinion, on page 267:

“Hence it is that where, at the time of the lease, the property is in a ruinous or defective condition, and by reason thereof the injury happens, then the owner or lessee is liable generally, though there are cases which make the liability dependent upon the covenants of the lease.”

But, if we are wrong in our interpretation of the allegations of the petition, the next claim of error brings us to another aspect of the same question, so that another resolution of it is offered

At the close of plaintiff's evidence, which tended to show that the accident happened because of original faulty construction, both defendants asked for the direction of a verdict in their favor.

Thereupon the plaintiff asked leave to reopen the case for the purpose, as he stated, “to put on proof as to the liability of James Flynn individually.”

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This was permitted over the objection of Flynn. Thereupon the plaintiff put Flynn on the stand for cross-examination, and drew from him that under an oral lease with the Flynn-Froelk Company he retained control of the elevator and was to keep it in proper condition.

This evidence made him liable under the ruling in the case already mentioned, and others referred to in the decision in the case of *Stackhouse v. Close*, 83 O. S., 339.

Counsel for plaintiff in error conceded that it was within the discretion of the court to open up the case and permit further evidence to be introduced under the allegations of the pleadings, but he urges that this additional evidence was on an issue not made in the pleadings, and so should not have been admitted, or, if admitted, should have been afterwards withdrawn from the consideration of the jury, as requested by him.

The matter is ruled by statute.

Section 11556, General Code, provides:

"No variance between the allegation in a pleading, and the proof, shall be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits. When it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court. It must also be shown in what respect he has been misled. Thereupon the court may order the pleading to be amended, upon such terms as are just."

Construing this section the Supreme Court, in the case of *Hoffman v. Gordon*, 15 O. S., 212, 218, says:

"The evident object of the code is to vest in the court a discretion, where it can be done without surprise or injury, to try the case upon the evidence, outside of the pleadings and if objection be made, to allow the pleadings to be conformed to the evidence, at once and without terms."

Here there was no surprise or injury. Flynn knew all the time the nature of his obligations regarding the elevator under his oral lease with his tenant. The record fails to show, as required by the statute, how he was misled, and so we must presume that he was not. True, he objected at the time to the intro-

duction of this evidence, and the plaintiff neglected to ask leave to amend his petition to conform to this evidence, but he could have done so and been granted the leave.

What was first said about the uncertain character of the allegations of the petition is to be borne in mind here, for having said allegations in mind it is not apparent that the variance suggested was material.

It was held in the case of *Sibila v. Bahney*, 34 O. S., 399, 408:

“That the evidence at the trial should be confined to the issue, admits of no doubt. The rule is as inflexible since as before the code, that the allegations and proof must correspond. But where the variance between the allegations and proof is such that the court would allow an amendment under Section 132 (G. C. 11557), without costs, to conform the pleading to the proof, the variance can not be deemed so far material under Section 131 (G. C., 11556) as to justify a reversal of the judgment.”

See also *Dayton Ins. Co. v. Kelley*, 34 O. S., 345; and *Benninger v. Hess*, 41 O. S., 64.

In the latter case, at page 69 of the opinion, the court says:

“Where a judgment has been rendered, and there has been a variance between the pleadings and the proof, but not such as to *mislead* the opposite party to his prejudice, and where there has been an omission in such case to conform the pleading to the facts proved, it will not be in furtherance of justice to deprive plaintiff of the fruits of the trial, by a reversal of the judgment in error.”

From this quotation and from the statute, it appears that a variance is not to be deemed *material* unless it “mislead the opposite party to his prejudice.”

We have already seen that Flynn was in nowise misled to his prejudice by this variance.

See also Section 11364, General Code.

The trial court, at the conclusion of this additional evidence, dismissed the lessee defendant from the case and it went to the jury on the liability of Flynn alone. The dismissal of the lessee is complained of, as error on the ground that it was an intimation that the court believed the owner was liable.

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Such is an unusual view to take of the matter and is not consistent with the failure of plaintiff in error to make the lessee a party defendant to these proceedings in error. However, as Flynn's case was submitted to the jury on evidence tending to establish his liability, under a charge which we find, as a whole, was unobjectionable, we must assume that the jury confined itself to that evidence.

It is claimed that the court in the charge treated of the subject of contributory negligence of the plaintiff, which would be reversible error, for no such issue was raised in the pleadings, but we have been unable to find a suggestion of that topic in the charge.

Some rulings on evidence are complained of. The plaintiff was permitted to ask Flynn whether he carried insurance on the elevator. This was permitted, possibly, as tending to show Flynn's own conception of his control over the elevator. It was an unnecessary question, because he had already fully stated that under his lease he remained responsible for the elevator. As he was not asked how much insurance he carried, we have concluded that the jury was in nowise biased against him by reason of the information it received on this subject.

Flynn was also asked, over his objection, whether immediately after the accident he made repairs to the elevator and he said he did. This question was competent as tending to show his control over it at the time of the accident, and not as tending to show that it was defective. The defect had already been proved.

We find no misconduct on the part of counsel for plaintiff in his argument to the jury. Counsel for Flynn himself asked what plaintiff's counsel meant by a certain statement, and if he was doubtful of any objectionable meaning at the time, it is not strange that a reviewing court should find no prejudice in the remark.

Nor have we any means of determining that the verdict was excessive, as charged. Defendant introduced no evidence in his own behalf and the case went to the jury on uncontradicted evidence, warranting the amount of the verdict.

On the whole we are unable to certify that substantial justice was not done in the case, and so the judgment is affirmed.

**CHOICE OF A FORUM BY INJURED EMPLOYEES.**

Court of Appeals for Cuyahoga County.

JOSEPH BOMGARDNER V. WILLIAM ZILCH, BY HIS NEXT FRIEND.

Decided, May 24, 1914.

*Recovery for Injuries—Under the Workmen's Compensation Act—Choice of a Forum—Application for Compensation—Failure to Prosecute Claim—Construction of Rules of the Board of Awards—Section 1465-61.*

1. Where an injured employee of an employer who has paid into the state insurance fund makes application to the state liability board of awards "for payment to him of money out of the state insurance fund," and this is done on a blank sent to him for that purpose by the state board, styled "First Notice of Injury and Preliminary Application," he will be held in so doing to have chosen his forum, and he can not thereafter maintain an action against his employer for compensation on account of the same injury.
2. Failure to further prosecute the claim before the state board after having thus elected to pursue that remedy is not a bar to an allowance to him by the state board, inasmuch as that board is not bound by technical rules but has full authority to make an investigation in such manner as is in their judgment best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the act.

*F. M. Secrest*, for plaintiff in error.

*A. L. McGannon* and *A. E. Powell*, contra.

GRANT, J.; WINCH, J., and MEALS, J., concur.

Error to the court of common pleas.

This is a petition in error which asks for the reversal of a judgment of the court of common pleas.

The parties here stand in the reverse order of their position in the court below, but they will in this opinion be designated as they were there.

The plaintiff, a minor, was in the employ of the defendant, and while so at work was injured by the operation of a circular

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The defendant had theretofore paid the premium required by the State Liability Board of Awards into the state insurance fund, and was then entitled to the protection designed by the statute to be given to employers under such circumstances, and the plaintiff in like manner had a right to share in the correlative benefits in that behalf.

Section 1465-61 of the General Code provides that where a personal injury is suffered by an employee, and such employer has paid into the state insurance fund, and in case such injury has arisen from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employees, "then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employee may at his option, either *claim compensation under this act* or institute proceedings in court for his damages on account of such injury."

The second paragraph of the above section reads:

"Every employee, *who makes application for an award from the State Liability Board of Awards*, waives his right to exercise his option to institute proceedings in any court."

The claim of the plaintiff was that he came to his injuries because the saw in question was left without a guard, contrary to statute. His case therefore was brought within the purview of the insurance fund law, just quoted.

He accordingly undertook to exercise the option thus given to him by making out, signing and sending to the State Liability Board of Awards, on the day of his injury, a paper, the caption of which was as follows: "In the Matter of the Claim of William Zileh for payment to Him of Money Out of the State Insurance Fund." Opposite to this caption, on the same page of the paper, are the following words and figures: "No. 5940. First Notice of Injury and Preliminary Application."

Immediately below these, on the paper in question, are the following words:

*"I hereby make application to the Industrial Commission of Ohio for the payment of money out of the state insurance fund on account of the injury to me hereinafter described, and hereby request that all forms and blanks necessary for the proper proof of my claim be furnished to me, free of charge."*

The data of the injury then appeared further down the paper, covering, it is believed, everything requisite to his participation in the benefits afforded by the statute, except the rate of wages he had been getting, but in any event stating enough to require the state board to investigate his case, under the law.

The blanks thus requested were duly furnished to the plaintiff, but he failed to prosecute his claim to further effect, and the state board, having waited for the time limited by its rules for additional proceedings, found that he had waived his right to compensation and adjudged accordingly.

The plaintiff thereafter commenced this action.

The foregoing facts were alleged in the defendant's answer.

When the case was put upon its trial to a jury the substance of the matters thus stated was admitted by counsel for the plaintiff. Whereupon the defendant, claiming that the plaintiff had thereby elected to proceed for compensation under the statute already quoted, and was for that reason barred of his action in court, asked that the cause be withdrawn from the jury, and demanded judgment accordingly. The request was refused.

When the plaintiff had taken all his testimony, the same motion was made. It was again denied, as it also was when, at the end of the evidence on both sides, it was made for the third time.

There was a verdict, upon which judgment was entered for the plaintiff, after a motion for a new trial had been overruled.

The question with which we are concerned is this: Did the plaintiff make an "application for an award from the state liability board?" If he did, then by the express words of the statute he is barred of his action in court.

To avoid an affirmative answer to this inquiry the plaintiff relies on the rules of the board.

The statute which creates the board and defines their procedure, permits them to make rules. This power is conferred by Section 1465-44, as follows:

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"The board shall adopt reasonable and proper rules to govern and provide for the kind and character of notices, and the service thereof, in cases of accident and injury to employees, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund, hereinafter provided for, *the forms of application* of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations, and inspections, and prescribe the time within which adjudications and awards shall be made."

Acting on the authority thus granted, the board has formulated a set of rules which are printed on the back of the paper sent forward by the plaintiff, as already stated. A copy of this paper is attached as an exhibit to the answer in this case, so that we have the whole question before us on the record, as it was also before the trial court when the motion to arrest the case from the jury was made and denied.

It is difficult from a mere inspection of these rules to say whether they contemplate, at least in some cases, two applications—one preliminary and the other final—or not. The first paper to be sent forward is not called an application, but a notice (see Rule 4). It is required—so the rule says—from an injured employee "who contemplates filing an application for an award." It is contended for the plaintiff that Rule 7 is the one which was operative in his case. It is as follows: "Applications for awards in all cases of injury not resulting in death must be made by the party injured not less than two weeks nor more than three months after the injury is received." • • • This application it is said never was made, and—such is the argument—the plaintiff merely exercised the option reserved to him by the statute of waging his rights in court rather than before the board.

It certainly is true that in some cases an award may be made without the application required by Rule 7. This is so where the claim is for medical services and does not involve compensation for injuries. Rule 8 specifically so says. So that, without regard to Rule 7, the board may, and does assume jurisdiction upon what Rule 4 designates a "notice."

That the board considers itself as entertaining jurisdiction under what it calls the preliminary notice provided for by Rule 4, is clear also from Rule 9, which requires the one filing the notice to be reminded of that fact in case he has neglected to proceed further, and thereupon to find that he has waived his right to compensation by his default.

The statute does not itself require or contemplate two applications, and whenever the board acquires jurisdiction it may, and should, pursue it to the effect which the act by its adoption was designed to reach.

It is quite true that Rule 4 does not speak of an application but a notice, and while it is also true that the blank upon which the plaintiff sent forward the paper referred to styles it "First Notice of Injury and Preliminary Application," neither of these designations is the language of the plaintiff. Both are the work of the printers—directed, no doubt, by the board—but by neither does the plaintiff say that he is sending a notice and not an application, or that if the paper is to be considered as an application at all, it is to be regarded as tentative and preliminary only, and not final. When he does speak in the paper, his language is direct and unequivocal; it is not open to change by construction—so plain and unambiguous is it. It says: "I hereby make application to the Industrial Commission of Ohio for the payment of money out of the state insurance fund, on account of the injury to me hereinafter described." He then requests the necessary blanks and forms to perfect his evidence. The latter was all he was called upon to do by the terms of Rule 4, and his preceding explicit application for compensation was wholly redundant, unless it operated to confer jurisdiction on the board to proceed and adjudicate his case. If language goes for anything at all, this language started the machinery of the board, and the applicant could have compelled action clear through to the end of his case—subject of course to such requisitions of the board as might be proper to bring any lacking data or proof before them. It is perhaps unfortunate that there should be any ambiguity in the rules as the board has seen fit to promulgate them, or that there should be a repugnancy be-

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tween the caption to a blank and the material and substantial thing absolutely stated below the caption. In such case the substance must prevail over form, and in any case the clear purpose of the statute must be carried out, which purpose manifestly is not to let a litigant change his forum after he has once effectually chosen one.

The statute could confer on the board the power to make all needful rules. It could not give the board power to say by a rule that an application is not an application but a notice. The statute itself requires an application, and it is not to be supposed that the legislative intent was to allow a plain and clear application to be construed as something that is not an application at all, but something very different.

While the purpose of this statute is highly remedial and it is for that reason to be liberally interpreted, this consideration does not permit a construction of it that amounts to a contradiction of its own terms or a manifest perversion of its language.

In giving this conclusive effect to the plaintiff's own act in choosing his own remedy, we are far from attaching the importance to our conclusion that was intimated at the argument. The plaintiff is by no means stripped of the remedy which he himself elected in the first place to pursue. The statute—Section 1465-76—says:

“Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in their judgment, is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act.”

Under the plenary power thus conferred and wholly in consonance with the evident policy of the law, the board, by Rule 11, has spoken, as follows:

“The provisions of Rules 4, 5, 7 and 8 will not be relaxed, unless, in the judgment of the board, the failure to observe their provisions was occasioned by want of knowledge of their existence, *and unless their strict enforcement will result in hardship and injustice.* In such instances the commission will, upon application, extend the time for filing.”

Bearing in mind that it was under Rule 8, which may in a case of hardship be relaxed, that the board made its finding that the plaintiff had waived the prosecution of his claim, then by the mandate of the section of the statute last quoted the spirit of the act should be enforced by the allowance of further proceedings towards that remedy which the plaintiff elected to invoke, as we have found, and from the due and effectual prosecution of which he was for some reason induced, or chose to abstain.

It is equally the spirit and the purpose of the act to forbid the sampling of forums for the redress of their grievances by injured parties. The election of one, once made, precludes the pursuit of another. The plaintiff in this case having made his choice must be held to it.

It follows that the trial judge should have allowed the motion of the defendant to take the case from the jury in the first instance—the facts then appearing which left him no standing in court. *Cornell v. Morrison*, 87 O. S., 215.

This conclusion makes unnecessary any discussion of the other assignments of error made in the brief.

For the error found the judgment complained of is reversed, and final judgment for the plaintiff in error is now rendered—such being what should have been done by the trial court.

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**TENDER VITIATED BY ATTACHING A CONDITION.**

Circuit Court of Cuyahoga County.

**BERNARD H. SINKS ET AL V. HUGH M. GREEN.**

Decided, February 6, 1912.

*Tender.*

A tender of stock is not sufficient when there is a coupled with it a condition that the party to whom the tender is made shall pay more for it than he has agreed to pay.

*Henry & McGraw*, for plaintiff in error.

*M. P. Mooney*, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

Green was the plaintiff below and will be so spoken of in this opinion. Sinks and others were defendants below and will be so spoken of in this opinion.

The plaintiff recovered a judgment against the defendants in an action brought by him to recover the amount he says the defendants owed to him upon a contract for the sale of certain stock in the Williams & Rogers Company, a corporation, or perhaps more properly stated, for damages for refusing to carry out the contract which he says the defendants made for the purchase of such stock.

The case in the court of common pleas was referred to Hon. John C. Hale, a former member of this court, who found the facts and his conclusions of law and reported the same to the court of common pleas. It is agreed here that the facts found by the referee are the real facts and the only facts necessary to be considered in the case. It is objected, however, that his conclusions of law from the facts are not justified, and the court of common pleas so found, the conclusions found by the referee being such as to deny to the plaintiff any right to recover. The court allowed a recovery. So then, we know the facts upon which the plaintiff is entitled to recover, if he is entitled to recover at all.

The contract which the plaintiff says the defendants refused to carry out, and because of which refusal he claims to be entitled to recover here, was entered into between Thomas Rogers, acting on behalf of himself and certain other persons associated with him in the ownership of the stock of the Williams & Rogers Company, on the one part, and William C. Roberts, acting upon behalf of himself and the defendants in this action on the other part. Several contracts were entered into by these parties, each supplementing a prior contract. It is sufficient to say in regard to them that the parties originally represented by Rogers in the sale proposed to sell, and did sell, 1,400 shares of the stock of this corporation, there being in all 2,000 shares of such stock. A price was agreed upon in the original contract, based upon an inventory of the assets of the corporation. By supplements made to this contract, the price was to be varied according as it should turn out that there was an over-valuation of certain parts of the assets. The final contract as agreed upon contained this clause:

"It is further hereby agreed that if at any time within two years from the date hereof the owners of said 600 shares or of any 100 shares shall elect to sell their said stock to second party at the price aforesaid, upon the terms of payment of the par value thereof in equal semi-annual installments, payable in six, twelve, eighteen and twenty-four months respectively, evidenced by four promissory notes bearing interest at six per cent. per annum payable semi-annually, and the balance of said purchase price in cash at the time of purchase, the said party of the second part will, within thirty days after written notice of the election to him, accept and pay for the said stock in the manner aforesaid, and said party of the second part hereby gives to said party of the first part, or the holders of said shares the privilege and option to sell same to him upon the terms hereinbefore in this paragraph set forth. The promissory notes to be given as aforesaid to be signed by satisfactory responsible parties to the approval of the president of the Central National Bank of Cleveland."

The plaintiff was the owner of 100 shares of this stock. He claims that he tendered the stock to the defendants and demanded of them that they carry out the provisions contained in

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that part of the contract hereinbefore quoted. What he did was, on the 12th of August, 1908, he sent a letter to the several defendants in this suit, except Aaron Skall, in which he said:

"The undersigned \* \* \* hereby gives you (who were represented by William C. Roberts in the making of said contract) formal notice that he hereby takes advantage of, and exercises the option therein given him, to sell his said one hundred shares of stock in said company, to you at the price provided for in said contract, and upon the terms therein set forth, to-wit: the same price per share as was agreed by said contract to be paid for the other fourteen hundred shares mentioned therein, and upon the terms hereinbefore set forth. \* \* \* The undersigned is ready, and hereby offers to deliver to you the said one hundred shares of said stock upon delivery to him of four notes signed as aforesaid."

The referee found that this was not a tender of the stock. In this we think the referee was clearly right. Nor was it necessary that he should then tender the stock, nor was it probably intended by him as a tender. It will be noticed that the contract provides that the party of the second part "will, within thirty days after written notice to him of such election, accept and pay for the said stock in the manner aforesaid." The letter of August 12, 1908, was such notice, and if followed up by a tender of the stock after thirty days from the giving of such notice and within two years from the date of the contract, the plaintiff would have complied with the contract and would have been entitled to recover the price agreed upon to be paid therefor, unless it be that the plaintiff was not entitled to the benefit of this contract, though made for his benefit and made between the parties who made it. As we view this case, it is not necessary to consider that question because, however we should hold upon it, we should reach the result which we do reach in deciding the case.

On the 3d of June, 1909, which was within two years of the date of the contract, and more than thirty days after the notice hereinbefore spoken of, the plaintiff wrote to each of the defendants the following letter:

"CLEVELAND, OHIO, June 2, 1909.

"MR. B. H. SINKS,

"City.

"*Dear Sir:* Pursuant to my written notice served upon you, bearing date of the 12th of August, 1908, in which I notified you of my election to sell my stock to you upon the terms set forth in the contract of June 28th, 1907, therein referred to, tendered you my said stock and demanded payment therefor in accordance with the provisions of said contract, I hereby renew my tender of said stock, preliminary to the commencement of suit, and offer to deliver same to you on the payment to me in cash of the sum of \$3,801.55 and the delivery to me of four notes as follows: one for \$2,500 payable in 8 months after date; one for \$2,500 payable in 12 months after date; one for \$2,500 payable in 18 months after date; and one for \$2,500 payable in 24 months after date. Said notes to bear interest at six per cent. per annum, payable semi-annually, and to be signed by satisfactorily responsible persons to the approval of the president of the Central National Bank of Cleveland, Ohio

"I herewith make the actual tender to you of certificate No. 52 for 100 shares in the capital stock of the Williams & Rogers Company, standing in my name, and duly endorsed for transfer. Upon failure by you to deliver me said cash and notes, signed as aforesaid, and to accept said stock, I shall at once begin suit against you to recover the amount due me.

"Very truly yours,

"HUGH M. GREEN."

And then produced a certificate for 100 shares of stock in this corporation, and as appears from the letter said:

"I hereby renew my tender of said stock preliminary to the commencement of suit, and offer to deliver the same to you on the payment to me in cash of the sum of \$3,801.55, and the delivery to me of four notes as follows: one for \$2,500 payable in 8 months after date; one for \$2,500 payable in 12 months after date; one for \$2,500 payable in 18 months after date, and one for \$2,500 payable in 24 months after date."

It will be noticed that this offer and tender was accompanied with the condition that the amount to be paid therefor was \$13,801.55. It is conceded that by reason of certain deductions which were to be made if the inventory should be changed, and which inventory was changed by the agreement of the parties

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to the original contract, the amount demanded was more than the amount to which the plaintiff was entitled, if he was entitled to be paid the agreed price. And so we come to the question, and to us the only question which we regard as necessary to determine in order to properly determine the case before us: Was this tender sufficient?

We do not base the conclusion to which we come upon the question of whether this tender of the stock which the contract required was to be regarded as requiring a delivery of the stock as a condition precedent to the bringing of the suit. The two things to be done, that is to say, the delivery of the stock and the payment therefor, were to be contemporaneous; they were to be done at one and the same time, and the plaintiff did all that was necessary for him to do in order to entitle him to bring the suit, unless he imposed a condition which took away the validity of his tender. He says in his petition that the amount to be paid for the stock is \$13,801.55 and he says:

"Plaintiff has been, from thence up (that is from the 12th day of August, 1908) to the beginning of this action, and still is, ready and offers to deliver his said 100 shares of said capital stock to the said defendants, upon payment to him of the purchase price thereof as provided in said contract, and he brings the said shares of said capital stock here into court to be delivered to the said defendants upon the payment by them of said purchase price."

The purchase price about which he is talking, and which he says they agreed to pay him, was \$13,801.55. As already said, it is clear that the purchase price was not so much as this by a considerable amount, because of the deductions which had been made from the inventory, and which, as to a part thereof at least, were well known to the plaintiff at the time he offered to deliver the stock, to-wit, on the 3d day of June, 1909.

We are of opinion that the plaintiff did not make such a tender of the stock either in August, 1908, or in June, 1909, as entitles him to maintain his action. The tender made was conditional, and it was conditional upon the payment to him of an amount to which he was not entitled.

In *Page on Contracts*, 3d Vol., Section 1421, it is said:

"The debtor may attach a condition to the tender requiring the creditor to perform some act which he would be in any event legally bound to do without affecting the sufficiency of the tender."

In Section 1422 of the same writing it is said:

"If, however, the debtor attempts to impose any condition not required by law, such as demanding that the tender be accepted as full performance, or that a discharge or a release in full be given, or that a right of appeal be waived, or that in connection with the debt in question other claims between the same parties be settled, the tender is insufficient."

Without quoting further from this section, it seems clear from the whole section that the writer does not regard a tender as sufficient where there is coupled with it a condition that the party to whom the tender is made shall do something which he is not bound by law or the contract to do, and this text is supported by a large number of authorities

In the case of *Raudabaugh v. Hart*, 61 O. S., 73, the second paragraph of the syllabus reads as follows:

"Where two acts are to be done at the same time, as when the vendor has agreed to convey interests in real estate upon the payment of a given sum as purchase money, the deal to be closed by a certain day named, and the purchaser has agreed to pay the purchase money, a part on that day and balance in one year, the conditions are what are known in law as mutual conditions, and neither party can maintain an action against the other without averring a performance, or an offer to perform on his part. Mere willingness and readiness to perform, uncommunicated to the other party, will not avail. And it is not, in such case, sufficient that the plaintiff aver that from the date of the making of the contract to and including the day at which it was to be completed, 'he was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract.' Nor are the averments sufficient, when, in addition thereto, he avers that 'the defendant, although often requested so to do, has refused to comply with said contract, and has at all times refused to transfer and deliver said property to plaintiff.' "

On page 89 of the same opinion, the court said:

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“But there seems no doubt as to the rule in this state. In *McCoy's Adm'r v. Bixbee*, 6 Ohio Rep., 310, it is held that ‘Covenants to convey a tract of land, specifying no time of conveyance, and a covenant to pay therefor so much money in hand and so much at a future day, are mutual covenants. In such a case a purchaser can not have a cause of action, without averring the payment or tender of the purchase money.’ And in *Campbell v. Gittings*, 19 Ohio, 347, it is held: ‘Where an article contains a covenant by one party to execute and deliver a warranty deed, and by the other to execute and deliver, when the deed is tendered a bond and a mortgage for the purchase money, though the party named neglect or refuse to deliver the deed, the other is not entitled to sue, after having neglected, at the proper time, to offer or tender a bond and mortgage; and a declaration on the covenant to make a deed containing an averment that the plaintiff offered to execute a bond and mortgage, without averring a tender, or what is equivalent thereto is bad on demurrer.’ And in the opinion by Avery, J., it is said: ‘The covenants of these parties respecting the deed, and the mortgage to secure the purchase money, being both to be presented on the same day, are dependent covenants in which, according to a clear legal principle, performance can not be exacted from either party, as a condition precedent. Both, it is understood must perform at the same time, neither being under any obligation to trust the other.’”

“The conclusion reached by us, as already said, is that the plaintiff did not, within two years from the date of this contract, make such tender to the defendants of the stock as entitles him to maintain his action, and there being no dispute as to the facts in this case, but all being conceded, we reverse the judgment of the court of common pleas and proceed to enter the judgment here which should have been entered in that court, that the petition of the plaintiff be dismissed at his costs.

**PROCEEDINGS UNDER A CHARGE OF CONTRIBUTING  
TO DELINQUENCY.**

Court of Appeals for Hamilton County.

**WILLIAM WALTON, ALIAS HOP, v. STATE OF OHIO; AND HERMAN  
BREINER v. STATE OF OHIO.**

Decided, April 10, 1914.

*Juvenile Delinquency—Defendant May Verbally Waive Trial by Jury  
—Sufficiency of Affidavits—Imprisonment in Work House.*

1. A jury may be waived by a defendant in the juvenile court, and where he elects so to do it is not necessary that the waiver be in writing.
2. It is not necessary that the negative averments of Section 1642, General Code, relating to jurisdiction over and with respect to delinquent and dependent and neglected minors, shall be incorporated in the affidavits under which arrests are made.
3. It is not error to sentence to the work house one found guilty of contributing to the delinquency of a minor under the age of seventeen years.

*James S. Myers and E. J. Franks, for Walton.*

*Powell & Smiley, for Breiner.*

*Thomas L. Pogue, Prosecuting Attorney, and A. J. Zanone,  
Assistant Prosecuting Attorney, contra.*

JONES, E. H., J.; SWING, J., and JONES, O. B., J., concur.

The plaintiffs in error were tried and convicted in the juvenile court for contributing to the delinquency of a girl named Mary Iding, who at the time is alleged to have been fifteen years of age.

The affidavits charge an offense defined by Section 1654 of the General Code, which provides:

“Whoever aids, abets, induces, causes, encourages or contributes towards the delinquency of a minor under the age of seventeen years, as herein defined, shall be fined not less than ten dollars nor more than one thousand dollars or imprisoned not less than ten days nor more than one year, or both,” etc.

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The cases were tried by the court without the intervention of a jury, and each of the defendants upon conviction was sentenced to pay a fine of \$200 and to imprisonment in the work-house for a period of three months.

In support of their prayer for a reversal of the judgment below the following points are urged in argument:

1. That there was irregularity and illegality in the proceedings below in that there was no jury impaneled to try the issues raised by the pleas of "not guilty," and that the record does not show that the jury was waived in writing by the defendants.

2. That the negative averments of Section 1642 of the General Code are not contained in the affidavits upon which the arrests were made and conviction had.

3. That the sentence, in so far as it provides for imprisonment in the work house is illegal and without authority of law.

With reference to the matter of trial by jury, the judgment entry in the court below contains the following language:

"This day came into court, the prosecuting attorney, on behalf of the state of Ohio, as also the said defendant, William Walton, alias Hop, who, being duly arraigned at the bar of our court, and examined of and concerning the charge contained in the complaint herein, as to how he will acquit himself thereof, for plea thereto saith that he is not guilty, and *waives his right of trial by jury.*"

Section 1651 of the General Code, found in the chapter relating to the juvenile court, provides in part as follows:

"A person charged with being responsible for or with causing, aiding or contributing to the delinquency, dependency or neglect of a child, arrested or cited to appear before such court, at any time before hearing, may demand a trial by jury, or the judge upon his own motion may call a jury."

So we see that under the terms of the statute describing the mode of trial of this class of cases it is provided that the accused may waive the right of trial by jury. The records in these cases show affirmatively that this was done orally by each of the defendants. According to a long line of decisions in our state, dating from an early period in our jurisprudence, it has

been repeatedly held and is now well established that it is not necessary in the trial of a misdemeanor case under provisions of law similar to that above quoted that the jury be waived in writing. See *Dailey v. State of Ohio*, 4 O. S., 57:

"Section 42 of an 'act defining the jurisdiction and regulating the practice of probate courts' passed March 14, 1853, providing that 'upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the probate judge shall proceed to try the issue,' is a valid and constitutional enactment.

"A record showing that the accused 'did not demand a jury' sufficiently shows a waiver of the trial by jury."

Also, to the same effect, *Dillingham v. State*, 5 O. S., 280:

"The constitutional right of trial by jury is not infringed when the option is given to the accused to have the same issue tried by the court or the jury, and he submits the cause to the court."

And *Billingheimer v. State*, 32 O. S., 435:

"In a trial before the police court of Cincinnati for a violation of the statute forbidding common labor on the first day of the week (S. & S., 289), unless the record shows that defendant demanded a jury, he will be deemed to have waived it."

Under these and other decisions which might be cited it appears well settled that the waiver of a jury is not required to be in writing. The record showing affirmatively in the cases that the accused "waives his right to trial by jury" we find no error in this respect.

The second point, viz., as to the absence of negative averments in the affidavit, is answered by the second paragraph of the syllabus in *Billingheimer v. State*, *supra*:

"A negative averment to the matter of a proviso in a statute, is not requisite in an information, unless the matter of such proviso enters into and becomes a part of the description of the offense, or is a qualification of the language defining or creating it."

An examination of Section 1654, under which these affidavits were drawn and which defines and describes the offense charged.

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shows an absence of any negative provisions. The negative provisions referred to by counsel are found in Section 1642, which section related to the matter of jurisdiction, and has nothing to do with the definition of this or any other offense, so that under the authority above cited it can not be claimed that it is necessary to embody the negative provisions of this latter section in an affidavit charging an offense under an entirely different section.

The third and last assignment of error related to the sentence imposed by the trial court. It is claimed that the court was without authority to sentence the plaintiffs in error to the workhouse. The statute under which they were arrested and convicted provides for a sentence of fine or imprisonment for not less than ten days nor more than one year or both.

Section 12370, General Code, defines the word "imprisoned" and provides as follows:

"In the interpretation of Part Fourth the word 'imprisoned,' where the context does not otherwise require, means imprisoned in the county jail if the maximum term prescribed for the offense is one year, and imprisoned in the penitentiary if the maximum term prescribed for the offense is longer than one year."

If this section has any application to the imprisonment provided for in Section 1654, such imprisonment must be in the county jail. It will be noticed, however, that the operation of Section 12370, by the language of the section, is limited to the term "imprisoned" as found in "Part Fourth." Section 1654 is not embodied in Part Fourth of the General Code, and it is doubtful whether Section 12370 has any application or can throw any light upon the meaning of the term "imprisoned" as found in Section 1654. But without any such aid to interpretation we are of the opinion that the imprisonment for one year provided for in the latter section means imprisonment in the county jail. If we are correct in this conclusion, then Section 4128 clothes the trial court with the authority to sentence offenders under Section 1654 to the workhouse.

"Section 4128. When a person over sixteen years of age is convicted of an offense under the law of the state or an ordinance

of a municipal corporation, and the tribunal before which the conviction is had *is authorized* by law to commit the offender to the county jail or corporation prison, the court, mayor, or justice of the peace, as the case may be, may sentence the offender to the work house, if there is such a house in the county."

The case of *Lemmon v. State*, 77 O. S., 427, is relied upon by counsel for plaintiffs in error as sustaining their contention upon this point; and from a superficial examination it would appear that the case is applicable and determinative. However, the section of the statute construed by the Supreme Court in the Lemmon case was amended within three months after the decision of the Supreme Court, and the obstacle in the way of sentence to the workhouse there pointed out was removed by the Legislature. This section, as it stood at the time of the decision in the Lemmon case contained the words "is directed" instead of the words "is authorized" appearing in italics above.

The reasoning of the court in the Lemmon case is to the effect that before a sentence to the work house can be legally imposed, it must appear that the section under which the sentence is imposed *directs* the court to imprison the convict in the county jail. The Lemmon case was a prosecution under the so-called Valentine anti-trust law, which law provided for a fine or imprisonment or both, as does Section 1654 in this case. The Supreme Court held that the imprisonment under this language was discretionary or optional with the court, and was not "*directed*," and hence, the section now numbered 4128 as it then read, gave the court no authority to sentence to the work house. The change of the words "is directed" to "is authorized," it will be seen, removes this objection, and the decision in the Lemmon case is rendered ineffectual by the amendment referred to. The amended section we think clearly authorized a court having discretionary power to impose a sentence of fine or imprisonment or both (in case imprisonment is ordered), to provide said imprisonment be in a work house, in a county where a work house is located.

Having found, therefore, no error in the records, the judgments below are affirmed.

**FAILURE TO COMPLY WITH ORDER OF COURT WITH  
REFERENCE TO PLEADINGS.**

Circuit Court of Cuyahoga County.

REBECCA HARRISON V. WALLACE I. KNIGHT, ADMINISTRATOR.

Decided, February 5, 1912.

*Striking Pleadings from Files.*

The right to strike pleadings from the files because of the failure or refusal of the parties filing them to comply with orders made in respect thereto, is inherent in the courts, and it is no valid objection to the exercise of this right that the pleading ordered stricken off states a cause of action or a good defense.

*Kerruish, Kerruish, Hartshorn & Spooner*, for plaintiff in error.

*Morgan & Litzler*, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The parties to this action, standing in the same order as in the court below, will be referred to as plaintiff and defendant, respectively.

On April 10, 1907, the plaintiff filed her petition against the defendant. The defendant filed a motion seeking to have certain matter stricken from the petition. This motion having been granted, the plaintiff, by leave of court, filed an amended petition. The defendant then filed a motion asking to have certain matter stricken from the amended petition, which was granted. The plaintiff thereupon obtained leave to file a second amended petition. This second amended petition having been filed, the defendant filed an answer thereto, to which answer the plaintiff filed a reply.

The defendant thereafter moved against this reply, and on hearing of the motion, the court ordered certain matter stricken therefrom. Leave was then given to the plaintiff to file an amended reply by a stipulated day. The plaintiff, however, did not file an amended reply but did obtain leave of court to file

another amended petition. After the third amended petition was filed, the defendant moved to strike from it certain allegations, and the motion was granted. The plaintiff again obtaining leave of court, filed a fourth amended petition, which, on motion of the defendant, was stricken from the files. Thereafter, the plaintiff filed, by leave of court, a fifth amended petition, which was also, on motion of the defendant, stricken from the files.

In striking the fifth amended petition from the files the court made the following order:

"The motion to strike the fifth amended petition from the files is heard and granted, at the plaintiff's costs, for which judgment is rendered against her, and said fifth amended petition is hereby stricken from the files. Plaintiff is refused permission to file any further pleadings in this cause. To all of which the plaintiff excepts."

This order was made on the 27th day of November, 1911. Previous to this date, on July 1, 1911, the defendant filed an amended cross-petition on which he caused summons to issue against the plaintiff. The summons was served on her on the 27th day of November, 1911.

The matter ordered stricken from the petition was in substance embodied in the various amended petitions filed by the plaintiff, and was incorporated in the reply.

The plaintiff seeks a reversal of the action of the court of common pleas in striking her fifth amended petition from the files and in making the order which has been quoted.

When the court ordered certain allegations stricken from the petition, it was the duty of the plaintiff, and of her counsel, to omit such allegations from all subsequent pleadings. Instead of doing this, however, the plaintiff, with slightly different phraseology, embodied substantially the same allegations in all of the various pleadings filed by her. In five amended petitions and one reply the decision of the court was ignored, and practically no attention paid to it. The filing of pleadings framed in disregard of the order of the court extended over a period of more than four years, and seems to have developed into a contest of endurance.

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It was within the power of the court to take such steps as would secure obedience to its orders, and to punish for contempt if necessary. Neither a party to the action, nor an attorney engaged therein, had any right to continue indefinitely to file pleadings containing matter which the court had decided repeatedly to be improper.

The method of securing obedience to its order was within the discretion of the court, and unless that discretion has been abused, or the court has exceeded its powers, the order made should not be disturbed.

The right to strike pleadings from the files because of the failure or refusal of the parties filing them to comply with orders made in respect thereto, is inherent in the courts, and frequent instances of its exercise are not found wanting.

In *Howard v. Western Union Telegraph Co.*, 25 Ky. L. Rep., 828, the question was before the court and it was there held that the refusal to comply with an order properly granted, to make a petition more specific is an act of contempt, rendering a dismissal of the action proper. See also *Saalfeld v. Cutting*, 49 N. Y. App. Div., 640.

It is no valid objection to the exercise of this right, that the pleading ordered stricken off states a cause of action or a good defense, as the case may be. This subject was considered in *Macadam v. Scuddy*, 127 Mo., 345. In the opinion, page 355, it is held:

“Upon the refusal of the plaintiff to comply with the rule and amend his petition, the court committed no error in dismissing the cause. This was the only alternative left to the court by which its authority could be maintained. The fact that the petition contained a statement of a cause of action, is no reason why it should not have been dismissed. The petition was not obnoxious to this motion, because it did not state a cause of action, but because the statement of the cause of action was so indefinite and uncertain that ‘the precise nature of the charges’ upon which the plaintiff sought to recover was not apparent. The defect could not have been reached by demurrer. The proper way to reach it was by motion.”

We decide, therefore, that the sustaining of the motion to strike the fifth amended petition from the files was an act within

the power of the court, and that the order in so far as it directed said amended petition to be stricken from the files was properly made, but the court went beyond this, and embodied in its order a provision that the plaintiff was refused permission to file any further pleadings in the cause.

In view of the fact that the defendant had caused summons to issue on his amended cross-petition, which was served on the plaintiff on the 9th day of November, 1911, we consider that the plaintiff had an absolute right to plead to this amended cross-petition. At the time the order was made, November 27, 1911, the time given her by statute for so pleading had not expired, and she was deprived of a right given her by statute.

The judgment or order of the court of common pleas striking the fifth amended petition from the files is therefore affirmed. but so much of said judgment or order as refused the plaintiff permission to file any further pleadings in the cause is reversed, and the cause is remanded to the court of common pleas for further proceedings.

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**DISTRIBUTION OF PROMISSORY NOTE BY ADMINISTRATRIX  
WITHOUT ORDER OF COURT.**

Circuit Court of Cuyahoga County.

CHRIST MEISTER ET AL V. JOHN FEUERSTEIN.

Decided, January 29, 1912.

*Promissory Note Belonging to Estate—Endorsement of, by Administratrix—Order of Court—Title of Endorsee.*

One to whom a note is endorsed by the administratrix of the estate of a deceased payee, may maintain suit thereon, though no order of distribution in kind was obtained from the probate court at the time, where it appears that all the debts of the estate had been paid and the distribution of the note was afterwards reported to the probate court and approved by it.

*R. E. McKisson, for plaintiff in error.*

*Morgan & Litzler, contra.*

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NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The plaintiffs in error were defendants and the defendant in error was plaintiff in the court of common pleas. When the terms "plaintiff and defendants" are used herein, reference is made to the relation of the parties in the court below.

The plaintiff brought suit in the court of common pleas against the defendants to recover on a promissory note, a copy of which is as follows:

"\$300.00

CLEVELAND, O., Jan. 14, '95.

"One year after date I promise to pay to the order of Christ Feuerstein, three hundred dollars, at six per cent (6%) interest. Value received.

"CHRIST MEISTER,

"JOHANNA MEISTER."

The note bears the following endorsement.

"Pay to the order of John Feuerstein.

"ESTATE OF CHRIST FEUERSTEIN.

"by EVA FEUERSTEIN, *Administratrix*."

It is established by the evidence set forth in the bill of exceptions that Christ Feuerstein, the payee in said note, was the father of the plaintiff; that some time prior to the bringing of the action, Christ Feuerstein died intestate, leaving the plaintiff his sole heir at law, and leaving a widow, Eva Feuerstein, who was duly appointed administratrix of his estate and who qualified as such; that all of the debts of his estate having been paid, the plaintiff and said administratrix entered into an agreement whereby the former was to take all the remaining property left by said Christ Feuerstein, and pay to the administratrix for her interest in the estate, as widow, the sum of \$4,000; that pursuant to this agreement, the note sued upon was indorsed over to the plaintiff in the manner indicated; that at the time of the making of this agreement and the indorsement of the note by the administratrix and its delivery to the plaintiff, no approval of the probate court had been obtained but that subsequently, after the suit was started, but before it was tried, the probate court, on the application of said administratrix, and with the consent of the plaintiff, duly approved the distribution in kind

of said note to the plaintiff; that the trial in the court below resulted in a verdict and judgment in favor of the plaintiff.

Upon this state of facts on the errors assigned, we are called upon to determine whether the plaintiff could rightfully bring suit on the note.

It is contended by the defendants that the title to the note in question was in the administratrix of the estate, and until the approval of the probate court was obtained, in compliance with the statute providing for a distribution in kind of certain forms of personal property, in which notes are included, she had no authority or right to transfer the note to the plaintiff, and he took no title by the indorsement. In other words, defendants contend that the plaintiff was not the real party in interest, and therefore could not bring the action.

Section 10839, General Code, provides:

“An executor or administrator who has paid all the debts of an estate, but has in his possession notes, bonds, stocks, claims or other rights in action, belonging thereto, with the approval of the probate court entered on its journal, and the assent and agreement of the persons entitled to the proceeds of such assets as distributees, including executors, trustees and guardians, may distribute and pay them over in kind to those of such distributees as will receive them.”

The plaintiff and administratrix, in this case, were the only parties concerned or interested in the distribution of the estate. The debts had all been paid at the time the note was taken by the plaintiff. There were no creditors to complain, because the debts of the estate had all been paid. Absolutely unimpeachable was the formal approval of the probate court, which was secured after the suit was started but before the trial took place.

In our opinion, the omission to secure the formal approval of the probate court did not operate to deprive the plaintiff of his right to bring suit on the note. The administratrix, being vested with the legal title to the note, by her indorsement transferred that legal title to the plaintiff. He thereby acquired a voidable, not void, title. As against creditors whose rights might be affected, or other distributees not consenting to the transaction,

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his title might have been assailed; but there were no such creditors and no such distributees. The only parties financially interested in the estate were the plaintiff and the administratrix, and when the latter entered into the agreement which resulted in the plaintiff taking the note, he became the only person financially interested therein, and at the commencement of the suit had both the legal title and beneficial interest therein.

The plaintiff would, of course, take the title with notice that it was liable to be defeated by the assertion of the claims of possible creditors, or perhaps by the refusal of the probate court to sanction the agreement between himself and the administratrix. His position would be analogous to one who, with knowledge, acquires trust property from a trustee. The law in such case is set forth in *Perry on Trusts*, Volume 1, Section 274, in this language:

“If a trustee conveys away the trust estate to another, even his co-trustee, and appoints another to execute the trust, the conveyance may pass the valid legal title, but it will have no effect in relieving the original trustee from responsibility, if the transaction is not sanctioned by the decree of the court, or by consent of all parties interested and it will transfer no authority to the person thus appointed, except to make him a trustee *de son tort*, if he attempts to interfere with the trust estate.” See also *Perry on Torts*, Volume 1, Section 334.

The subsequent approval of the probate court confirmed the plaintiff's title to the note, and would have relation back to the time of its acquisition by him. We are supported in this opinion by *Palmer v. Whitney*, 166 Mass., 306. In the opinion, on page 308, Field, C. J., says:

“It has been held that the only way in which an administrator of an intestate estate can effectually protect himself against the claims of all possible distributees, is by obtaining a decree of distribution and distributing the estate in accordance therewith. Such a decree, obtained according to law after due notice, is a protection against all the world. (*Gathaway v. Bowles*, 136 Mass., 54.) But it is a common practice, when the distributees are known and their shares undisputed, to pay them what is due without a decree of distribution and to credit payment in the final account. When such payments are made and are credited

in the account, and the distributees assent to the account, or have notice of it and make no objection to the allowance of it, or are heard upon the allowance of it and their objections are overruled, we see no reason why the account should not be allowed. If the distributees have actually received all they are entitled to, they ought not to be heard to complain that the formality of obtaining a decree of distribution has been omitted. An administrator distributing property without a decree of distribution incurs the risk that there may be distributees who are not bound by the allowance of his account, but if he is willing to take this risk, the distributees who have received all they are entitled to can not complain of the procedure."

In *In re Scott's Account*, 36 Vermont, 297, the court on page 300 says:

"The main purpose of the statute in providing for the order of distribution seems to be to insure the just accountability to the party entitled for the money thus being in the hands of the administrator. When that end has been accomplished by this voluntary action, there would seem to be no occasion for resorting to the court for an order in that behalf.

"Another purpose of that provision seems to be to enable the administrator to protect himself under an order of the court against any claims that might be made on him for funds of the estate in his hands. If he should see fit to take the risk of disposing of the funds without the shield of such order, and no claim should be made upon him by any person otherwise entitled to those funds, and in point of fact he had paid them over to the person entitled and to whom they would have been ordered to be paid, it is difficult to see on what ground the transaction can be called a question."

The case of *Maraton et al. Administrators, v. Noble et al.* 10 La. Reports, 210, is similar to the case under consideration. The syllabus reads as follows:

"The defense to the plaintiffs' action on a promissory note was that the note belonged to the estate of Kemp; that it was not a negotiable instrument, and that no legal title passed to the transferee. The note, however, being indorsed in blank by Noble, the payee, and by Lea in his individual capacity, went into the hands of Bullard. *Held*: There is no affirmative evidence impeaching the validity of this transfer as one detrimental to the estate of Kemp, and Noble having been notified of the

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transfer some time before suit brought, and no payment having been made to the estate on account of the note, there is no equitable reason for turning plaintiff out of court for not showing a judicial authorization of transfer to him."

Our attention has been called to *McBride, Admr., v. Vance*, 73 O. S., 258, where it is held that the personal property of a deceased person does not vest in his heirs, but is in abeyance until administration is granted, and is then vested in the administrator by relation from the time of death, and no right of action on a promissory note belonging to a deceased person is shown by a party in an action on the note by proof of possession and that he is the sole heir of the decedent.

It is claimed by the plaintiff in error that this decision should control in this case, but in our opinion an entirely different question was involved in that case than the one under consideration. There the plaintiff did not, as in this case, derive title through an administrator, but sought to recover solely on the theory that she was the sole heir at law of the decedent to whom the note belonged, and that having possession of the note she was entitled to maintain the action. It is clear that she had no legal title to the note sued upon, and perhaps had no beneficial estate therein, depending upon the question of whether or not the proceeds of the note might be necessary for the payment of debts of the estate. Here the plaintiff obtained title by the indorsement of the administratrix, which, though voidable when it was acquired by him, was in fact not avoided, but on the contrary, confirmed by the action of the probate court, and in addition to the legal title, had the sole beneficial interest in the note.

We find no error prejudicial to the plaintiffs in error in the rulings of the court of common pleas in which the question of the right of the plaintiff to bring his action was raised, and no error in any of the matters assigned in the petition in error as grounds of error, and the judgment of the court of common pleas is affirmed.

**LINE REPAIRMAN INJURED BY APPROACHING CAR**

Court of Appeals for Richland County.

**THE MANSFIELD RAILWAY, LIGHT & POWER COMPANY  
v. JOHN E. BARR.**

Decided, February Term, 1914.

*Master and Servant—Negligence—Duty of Electric Railway Management Toward Men Repairing Trolley Wires—Charge of Court—Excessive Verdict.*

1. Where a repairman is sent to adjust a trolley wire, it is the duty of the railway company in the exercise of ordinary care to make proper provision to protect him from injury from cars using the track over which the wire upon which he is at work is strung.
2. A motorman running a car upon such track under the direction of his conductor is not a fellow-servant of one engaged in repairing the trolley wires.
3. Where a repairman so engaged discovered a car bearing down upon him and in dangerous proximity, it is for the jury to say, under proper instructions from the court, whether or not he was guilty of contributory negligence in jumping from his perch, thereby sustaining the injuries of which he complains.
4. A verdict for personal injuries will not be set aside simply because it is excessive in the mind of the court, but only where the excess is so great as to shock sound judgment and a sense of fairness toward the defendant.

*McBride & Wolfe*, for plaintiff in error.

*W. S. Kerr*, contra.

BY THE COURT (VOORHEES, SHIELDS and POWELL, JJ.).

A verdict of \$8,500 was awarded the defendant in error, as damages for personal injuries alleged to have been sustained by him as a result of the alleged negligence of the plaintiff in error, while he was in its employ as a repairman of its electric lines.

To state the cause of action more fully, the plaintiff in his petition filed in the court below alleged:

"That on the 9th day of October, 1909, and prior thereto he was employed by the defendant as a repairman on its lines in Mansfield, Ohio, and to do such other work and service in con-

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nection with the maintenance and repair of its lines as might be assigned him by the defendant. In doing said work for the defendant he was required, when it became necessary, to go up on top of a repair car and from that position repair wires, switches, etc. On the said 9th day of October, 1909, there was a break in the wires of said defendant's lines on Spring Mill street of said city at or near the point where Mulberry street and Spring Mill street branch. In the usual and ordinary course of his duty he went to the break on a repair car, and went on top of said car, which was about twelve feet above the street, to repair said break and while so engaged and without any fault or negligence on his part the repair car, upon which he was standing in doing the work aforesaid, was run into by one of the defendant's cars from the Shelby line.

"That when he saw that the Shelby car was going to strike his car, he was standing on the top of a platform or box of sufficient elevation above the roof of the car to enable him to reach and do the work he was doing and being afraid that he would be thrown from the box or platform to the street by the collision of the cars he jumped from the platform or box to the roof of the car and by the shock of the collision he was thrown from the roof of the car to the brick street.

"That he struck on his feet on the brick street from a distance of about twelve feet and that both ankles were fractured; that the bones of his ankles have grown together where some of the fractures were, and that he is now unable to walk but with great difficulty and he is permanently disabled from doing manual labor. He suffered great pain and he is unable to walk without great pain and suffering in his ankles. He expended the sum of \$100 for medical services in attempting to be cured.

"That the defendant by its servants negligently and recklessly run the said Shelby car onto and against the repair car on which he was working and thereby caused the injuries of which he complains; that the said Shelby car was under the charge of a conductor who had control of the movements of the same, and that a motorman was employed on said Shelby car who was under the control of the conductor, and that said conductor and motorman negligently and recklessly ran said Shelby car onto and against said repair car as alleged; and he avers that the officer or agent of the defendant who has the supervision and control of the movement of the cars on the defendant's lines, with knowledge that plaintiff was engaged in repairing the lines as alleged and that in doing so it was necessary that said repair car occupy the track, failed and neglected to notify or warn

the conductor on Shelby car of this fact, whereby the injury to plaintiff would have been prevented. He says the car on which he was working was in sight of the conductor and motor-man of the Shelby car and that he could be seen far enough to stop the Shelby car if they had exercised reasonable care in the premises. The defendant is a corporation organized under the laws of Ohio, and as such operated a city and suburban railway in the city of Mansfield and to Shelby as alleged. Wherefore judgment is prayed for in the sum of \$10,000."

By answer the defendant admits that the plaintiff on the 9th day of October, 1909, and prior thereto was employed by it as stated in said petition, that in doing said work for the defendant he was required and it became necessary to go up on the top of a repair car and from that position repair wires, switches, etc.; that on said 9th day of October there was a break in the wires of the defendant's wires on Spring Mill street; that he went to the break on a repair car, and went on top of said car to repair said break, but it denies all the other allegations in said petition.

For a second defense the defendant says "that the plaintiff's injuries, if any were received, were caused by his own fault and negligence directly contributing thereto in jumping from said car and in taking no precaution whatever for his own safety."

The reply is a general denial of the contributory negligence charged.

Upon the issues thus made by the pleadings, the cause was submitted to a jury resulting in a verdict for the plaintiff. A motion for a new trial was overruled and judgment was entered upon said verdict. A bill of exceptions was taken containing all the evidence offered upon the trial, including the charge of the trial court, and by a petition in error said cause was brought into this court for review.

There is little or no controversy between the parties hereto as to the facts leading up to the injury here complained of. The employment of the defendant in error by the plaintiff in error to repair the wires on its lines, and, if necessary, to make such repairs on the top of its repair cars, that in pursuance of

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such employment he went on top of such car to repair a break in the wires of the plaintiff in error at the time and place stated, and while he was so at work an interurban car on the Shelby line of the plaintiff in error, operated by a motorman in its employ, collided with said repair car, is admitted; and while it is not contended that the defendant in error was not injured thereby, it is insisted by the plaintiff in error that whatever injuries were sustained by the defendant in error were caused by his own negligence and carelessness, and that therefore said company is not liable in this action.

It is hardly necessary to remark that if the evidence fairly shows the facts to be as claimed by the plaintiff in error, namely, that the defendant in error's negligence directly contributed to or was the proximate cause of his injury, or if it should appear by the evidence that the concurrent negligence of both the defendant in error and the plaintiff in error contributed to and produced said injury, then the motion submitted for an instructed verdict should have been sustained and not overruled.

An examination into the facts of this case as disclosed by the bill of exceptions tends to show that on the morning of the day mentioned the defendant in error, then in the employ of said company as lineman, seeing the break in the wires of said company at the place mentioned, and upon arriving at said company's office reported the same to the general manager of said company, who personally directed him to repair said break without delay. Acting under such directions he prepared to make such repairs, and soon thereafter took out and employed the use of the repair car of said company used for such purposes, following what was known as the Shelby car of said company, operated on and over the streets in the city of Mansfield, and between Shelby and said city of Mansfield, to the place where the wires of said company were out of repair, and where said repair car stopped on said company's tracks, with its brakes set, to enable the defendant in error, with a helper, to make such repairs. It appears that said repair car was so constructed that it became necessary to use a box on top of the platform of said car to make said repairs, and that such a box was used by the defendant in error for that purpose, and that while on said box at work

repairing said wires, with his back to the north, his attention was called by his helper to a Shelby interurban car approaching, when turning around and finding that said car was about to collide with said repair car, he jumped to get down and failing to get hold of anything he fell on the brick pavement and was injured, or quoting from the language of the witness "I turned right around, saw that it was right on to us, and I made a jump to get down and get hold of something and I went on off;" that said interurban car did there collide with said repair car, knocking the latter forward on the tracks of the company some considerable distance from the point of said collision.

It further appears that said report of the condition of said wires was so made to the manager of said company about 8:30 on the morning mentioned; that the Shelby car which the defendant in error followed with said repair car to Spring Mill street, where the wires were out of repair, left Mansfield for Shelby at 9 o'clock on said morning; that under the schedule time of said company a car from Shelby bound for Mansfield left Shelby at 9:05 on said morning; that such car would pass the car going from Mansfield to Shelby, if on schedule time, at Spring Mill, where it was the rule or custom to have telephonic communication between the officers or employees of such car and the Mansfield office of said company, and that a like rule or custom obtained with cars leaving Shelby for Mansfield. The foregoing facts as gleaned from the bill of exceptions have been stated with some degree of particularity that they may aid in the consideration of the issues raised by the pleadings therein.

It is fundamental that negligence as a ground of recovery is not to be presumed from the happening of an accident but must be proven. As was announced in the case of *Railway Company v. Marsh*, 63 O. S., 236:

"Negligence must be proved either by testimony directly establishing the fact, or by the proof of facts from which negligence will reasonably follow and be presumed. The jury can not be allowed to guess that there was negligence without some proof thereof, either direct or inferential."

The correctness of this proposition as one of law is not to be questioned. In the abstract it is applicable alike to all cases

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triable by jury, namely, that the material and ultimate fact upon which a recovery is sought must be proven. The importance of applying this salutary and essential principle of law is emphasized by the verdict in this case. The amount of the verdict, when considered with reference to the issues raised by the pleadings, renders it necessary that the whole record of the case should be thoroughly canvassed with the sole view of ascertaining whether such verdict is authorized by the evidence and the law. To this end we have read the entire bill of exceptions with not a little care with reference to the respective claims of counsel on either side.

It is charged in the petition that the company was negligent in running its Shelby interurban car against and colliding with the repair car on which the defendant in error was at work repairing said wires, which it is alleged was the proximate cause of his injury. The testimony as to whether the manager of the company who is in legal effect the master here, personally directed the defendant in error to repair said wires is somewhat in conflict, but we are inclined to hold that a fair construction of the testimony in this respect shows that such order was given. Having been ordered to go to the scene of the work to repair these wires with said repair car, and having gone and engaged upon said car as ordered, which was known to be peculiarly dangerous, with the knowledge on the part of the company that cars were scheduled soon thereafter to pass at the place where he was so engaged, including the said Shelby interurban car, was it not the duty of the plaintiff in error, in the exercise of ordinary care, to make proper provision for the safety of the defendant in error as would afford him protection from the dangers incident to the operation and movement of cars between Shelby and Mansfield and in Mansfield, to avoid collision with said repair car while he was engaged in said work of repairs? We think, it was, and we further think that this question, in terms, was properly submitted to the jury by the trial court in its charge. *Ry. Co. v. Murphy, Admr.*, 50 O. S., 135; *Ry. Co. v. Lavalley*, 36th O. S., 221; *N. Y. C. & St. L. Ry. Co. v. Ros, Admr.*, 19 C. C., 689.

It was contended on behalf of the plaintiff in error that the motorman in charge of the Shelby interurban car and the defendant in error were fellow-servants, and that therefore, if the injury to the defendant in error was the result of negligence, it was that of a fellow servant and not that of the plaintiff in error. Plaintiff in error testified that he was acquainted with the rules of the company in the operation of its cars between Shelby and Mansfield, and that before leaving Shelby the officers or employees of the car would "call in and get orders" from the Mansfield office, and the same practice was observed in passing Spring Mill. If this is true, knowledge of the time the car in question left Shelby was brought direct to the knowledge of the plaintiff in error, and although the motorman of such car may have been negligent in failing to see said repair car and in colliding with it, if the plaintiff in error then knew that said interurban car was on its way from Shelby to Mansfield, and then knew that the defendant in error was then engaged in the work of repairing said wires and took no steps to protect him from the danger of said car colliding with said repair car, and colliding with said repair car the defendant was thereby injured, then it would be a question for the jury to determine whether or not the plaintiff in error was not guilty of negligence, and if so, whether or not such negligence was the direct and proximate cause of the injury to the defendant in error. On this subject the court below charged the jury as follows:

"If you find that the manager of the company knew that the plaintiff in the discharge of his duties intended to make the alleged repairs on said trolley, and you further find that an ordinarily prudent person, under the circumstances and in the situation of the manager of the defendant company, would have reasonably apprehended from the character of the work and the time and place of its performance that the plaintiff would, in the performance of such work, under the circumstances, be placed in peril and danger by reason of the operation of the city and interurban cars upon the track at such point where plaintiff was working, then it would be the duty of the defendant to exercise ordinary care to obviate possible injury to plaintiff arising from the perils, if any, that might reasonably be apprehended in the operation of its cars at said place, while plaintiff was in the performance of his duties.

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“If the defendant failed or omitted to exercise such care, then such failure or omission would constitute negligence on its part, and, if such negligence was the direct and proximate cause of injury to the plaintiff, or if the motorman of the car that collided with the work car was guilty of negligence as charged in the petition, and such negligence, if any, combined with the negligence of the defendant resulted in injury to the plaintiff, defendant would be liable, unless plaintiff, immediately prior to and at the time of the accident was guilty of negligence directly contributing to his own injury.”

We think that the foregoing contains a fair and correct statement of the law applicable to the facts in this case.

While the defendant in error on entering the service of the company assumed the ordinary and natural risks incident to his employment, including those of his fellow-servants, he did not assume the negligence of the company. The motorman here was engaged in another branch and department of service and in a different service from that of the defendant in error. He was engaged in managing and operating an electric car under the control of a conductor, while the defendant in error was a general repairman with no one in authority over him. Their duties were entirely separate and distinct, and being engaged in different branches and departments of service, we are of the opinion that they were not fellow servants, so that while the motorman in charge of the Shelby interurban car may have been negligent, still under the facts as they appear here, the commingled negligence of the motorman with that of the company would be the negligence of the company and render it liable. *Carter v. McDermott*, 5th St. Railway Report, 72; *Railway Company v. Henderson*, 37th O. S., 549; *N. Y., C. & St. L. Ry. Co. v. Ros, Admr.*, 4 C.C.(N.S.), 284.

It is contended by the plaintiff in error that the conduct of the defendant in error in jumping from the repair car immediately before the collision showed such contributory negligence upon his part as to defeat his right to a recovery herein. This was a question for the jury, and upon this subject we are of the opinion that the court below properly instructed the jury. In the light of the uncontradicted testimony of the defendant in error that he suddenly found himself in a position of imminent danger

by the close approach of the Shelby interurban car to the repair car on which he was working, he was not to be held to a strict account as to the course of conduct pursued by him to avoid danger, and possibly save his life. *Penna. R. R. Co. v. Snyder*, 55 O. S., 342.

It is also contended by the plaintiff in error that the court below erred in its charge to the jury in not definitely defining the issues between the parties hereto. A reading of said charge shows that the pleadings were not only read to the jury but that the issues of fact as raised therein were later on during said court's charge to the jury called to the attention of the jury and special instructions pertaining thereto were given by said court, all of which we are of the opinion was entirely consistent with the rule laid down in the case of *The Baltimore & Ohio R. R. Co. v. Lockwood*, 72 O. S., 586.

It is further contended by the plaintiff in error that the court below erred in its instructions to the jury respecting the duty of the company in the matter of furnishing the defendant in error a safe place to work. On this subject said court charged the jury as follows:

"The relation between plaintiff and defendant was that of master and servant and by virtue of such relation while the plaintiff was in its employ, the defendant would owe to him the duty of exercising ordinary care to provide him a reasonably safe place for the performance of his services. Thus a master would be bound to take all such precautions for the protection of one in his employ as an ordinarily prudent person would take to protect a servant in his employ from danger, having due regard for the character of the work and the place of its performance."

This instruction we think is in harmony with the principle enunciated in the case of *Railway Company v. Frye*, 80 O. S., 289, and we therefore hold that the contention of the plaintiff in error in this respect is not sustained.

Errors are also claimed in the action of the court below in the admission and exclusion of certain evidence offered upon the trial including the examination of the ankles of the defendant in error by a physician in the presence of the jury, and the

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advice given by a certain physician to the defendant in error to have his case treated by a certain Chicago specialist and his charges therefor, and alleged conversations with the defendant in error in respect to the cause of the accident, all of which we have looked into and we are of the opinion that while perhaps technical errors did intervene in the admission of testimony offered in the respects mentioned, we do not regard them as prejudicially affecting the interests of the plaintiff in error, and for this reason we hold that they, or either of them, do not constitute ground for reversible error.

The petition in error filed herein sets forth as one of the grounds of error assigned that the court below refused "to give the several charges asked for by the defendant in error." We have examined said petition in error with reference to this alleged assignment of error and find no such requests made.

It is urged that the verdict and judgment are against the weight of the evidence and contrary to law, and that the damages are so excessive as to appear to have been given under passion or prejudice. As before stated, we have read the entire bill of exceptions and have carefully considered such parts of it as relate to the more important features of this case, and in the light of the direction given to the defendant in error to do this repair work, the circumstances under which it was done, or undertaken to be done, the history of the facts known to or presumed to have been known by the company immediately preceding and at the time of the collision of the cars resulting in injury to the defendant in error, with the case fairly presented to the jury, under proper instructions, as a reviewing court we do not feel justified in disturbing the verdict of the jury upon the ground that the same is not sustained by the evidence, or that the same was clearly against the weight of the evidence and contrary to law.

As to the damages being excessive as if given under the influence of passion and prejudice, in the absence of a showing made that the jury were so influenced, the presumption would be otherwise. True the verdict given was for a substantial sum, but it was the province of the jury to fix upon the compensation

to be awarded the defendant in error, if any, under the facts in the case as shown by the evidence.

In *Fisher v. Patterson*, 14 th Ohio, 418-427, which was a suit for libel, Judge Read announcing the opinion of the court said:

"In cases where the damages are to be determined by the sound discretion of the jury, in view of all the evidence the court will not interfere to grant a new trial on the ground of excess, unless the damages are so outrageously gross as to convince the court that the jury must have acted from corruption, or bias or mistake, or some other improper influence, instead of a sound and enlightened judgment."

In *L. S. & M. S. R. R. Co. v. Louisa Schultz, Admr.*, 19 Ohio Circuit Court, 639-647, which was a personal injury case, Judge Parker announcing the opinion of the court, quoting with approval Judge Hammond in *Smith v. Pittsburg & Western Ry. Co.*, said:

"A verdict should not be set aside simply because it is excessive in the mind of the court, but only when the excess is shocking to a sound judgment and a sense of fairness to the defendant. When there is any margin for a reasonable difference of opinion in the matter, the view of the court should yield to the verdict of the jury rather than the contrary."

In *Walker v. Railway Company*, 63 Barbour, 267, which was a personal injury case, the trial judge said:

"The defendant's counsel, however, contends that the recovery in the action was excessive. In this class of cases no precise rule exists, by which the extent of the recovery can be prescribed; for the compensation to be received is, to a great extent, to be awarded for pain and suffering which can not be accurately measured by amounts. \* \* \* The law has, accordingly, in this class of cases, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And where the verdict rendered by them, may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the courts is and necessarily must be, not to interfere with their conclusion."

In the case before us the evidence showed the defendant in error to be thirty-seven years of age, in good health and receiv-

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ing fair wages when injured. Upon the whole case we can not say that the compensation awarded by the jury is unreasonable or excessive and we therefore do not feel justified in disturbing said verdict. We are therefore of the opinion that the court of common pleas did not err in overruling the motion for a new trial, and the judgment of said court will therefore be affirmed with costs, but without penalty. Exception may be noted.

**DETERMINATION AS TO WHETHER MONEY WAS RECEIVED  
AS A GIFT OR AN ADVANCEMENT.**

Court of Appeals for Hamilton County.

AARON A. FERRIS, EXECUTOR, V. JAMES GOODIN ET AL.

Decided, December 13, 1913.

*Distribution—Gift of Money to a Niece—Held to Have Been an Advancement—Acceptance by an Heir Amounts to a Contract, When—Ademption—Estoppel.*

Under the evidence and circumstances surrounding the payment made in this case the court holds that it should be treated, not as a gift, but as an advancement to be charged against the interest of the payee in the estate.

*Aaron A. Ferris, Rufus B. Smith and Bruce & Bruce, for plaintiff.*

*John C. Healy, contra.*

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

This is a proceeding brought by the executor and trustee under the will of Elizabeth Zinn, under Section 10857, General Code, asking the direction and judgment of the court as to whether the sum of \$2,000 should be treated as a gift to Virginia G. Ellard, a sister of said deceased, or as an advancement to be charged against her interest in said estate.

The will of said Elizabeth Zinn was made August 10, 1906, and provided for certain legacies and trusts, dividing the resi-

due of the estate into five equal parts, one of which was given to a brother, one to a sister, and the other shares in trust for the benefit of another sister, certain nieces and nephews and other relatives. Mrs. Zinn died February 28, 1908.

It is claimed by the executor and trustee and on behalf of certain legatees and beneficiaries under the will that the share of Mrs. Ellard should be charged with two thousand dollars which was paid by New York draft drawn by the Merchants' National Bank, dated May 20, 1907, and payable to the order of Mrs. Elizabeth Zinn. This draft was procured for Mrs. Zinn by A. A. Ferris, who was then acting as her attorney and managing her business affairs, and it was endorsed by Mrs. Zinn to the order of Virginia G. Ellard, and endorsed by Mrs. Ellard to the order of Mary E. Hoffman, her daughter, who collected the money thereon.

It appears that this draft was procured by Mr. Ferris and was sent by him with a letter to Mrs. Zinn, dated May 20, 1907, in which he advised her not to endorse the draft in blank but to make it payable either to Mrs. Ellard or to Mrs. Hoffman as she might prefer. In this letter he also transmitted to Mrs. Zinn the form of a note which he explained in the following language:

"Also find enclosed the form of a note which should be signed by Mrs. Ellard, as to money is really advanced for her. It is a matter of business, in the sense of advancing the money at least, and therefore you should have written evidence that the money has been advanced, and a note is the best form in which to have the acknowledgment."

Mrs. Zinn after receiving this draft from her attorney endorsed it as above stated and delivered it to Mrs. Ellard, requesting her to sign the note. Mrs. Ellard retained the draft but declined to sign the note. Mrs. Zinn on the following day reported to her attorney the refusal of Mrs. Ellard to sign the note and authorized him to stop payment on the draft until some satisfactory acknowledgment was received from Mrs. Ellard of the money so paid.

Under this direction and authority Mr. Ferris, acting for Mrs. Zinn, stopped payment of the draft and wrote Mrs. Ellard ad-

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vising her of this fact and enclosed in his letter a blank form of receipt, stating in his letter that "the draft will not be paid until there is some written acknowledgment from you of the receipt of the money," and saying:

"I enclose herewith a blank form of receipt. You can, if you please, fill it out yourself giving the form of it, it being only necessary that you should express in some words that you have received the \$2,000. When such receipt is delivered to Mrs. Zinn and she notifies me to that effect I will countermand the order stopping payment on the draft."

Mrs. Ellard then filled up and returned to Mr. Ferris her receipt in the following words:

"CINCINNATI, May 23, 1907.

"Received of my sister Elizabeth Zinn her draft for \$2,000, on account of my future interest in her estate.

“(Signed) VIRGINIA G. ELLARD.”

The attorney after receiving this receipt from Mrs. Ellard advised Mrs. Zinn that he had satisfactory acknowledgment from her, and thereupon under Mrs. Zinn's authority countermanded the order stopping payment on the draft, and the money was paid.

The testimony was received on behalf of Mrs. Ellard, subject to the objection and exception of the other side, tending to show a gift by Mrs. Zinn to her niece, Mrs. Hoffman, who was the daughter of Mrs. Ellard, of this two thousand dollars to be used by her in the purchase of a house.

It is a well settled principle of law that parol evidence can only be admitted to set aside such an instrument as the receipt made by Mrs. Ellard upon the ground of fraud or mistake. No such claim is made by her here in her pleadings. She seeks only to explain the receipt, or to have it disregarded by the introduction of evidence tending to show that the money was not in any way intended for her but was to be a gift to her daughter. This parol evidence can not be received to contradict the written instrument. *Jackson v. Ely*, 57 O. S., 450; *Cassilly v. Cassilly*, 57 O. S., 582.

Indeed even if this evidence might be considered by the court, we do not feel that it would be sufficient to cause the delivering of the draft to Mrs. Ellard to be construed as an outright gift to Mrs. Hoffman which could in no way affect the ultimate share of her mother. Especially so when we consider the manner in which the draft was endorsed and the form of the receipt.

The effort of the defense has been to show that the idea of making this payment a charge upon Mrs. Ellards' share was one originating solely with Mrs. Zinn's attorney. But both Mrs. Zinn and Mrs. Ellard were clearly advised of it. Mrs. Zinn acted upon her attorney's advice, and even though she did not herself see the receipt as finally written she was informed of its effect and was satisfied. And Mrs. Ellard, although she refused to sign the note, voluntarily made out and signed the receipt and did not undertake to appeal from Mr. Ferris to Mrs. Zinn to have the matter put in what she now claims to be its true character. So having agreed to the transaction as it was carried out, she must now be bound by it.

The general rule as to ademption is that it is wholly a matter of the intention of the testator. Where a legacy is given by a testator to a child or to one to whom he stands *in loco parentis*, a subsequent payment made to such child or person will raise a presumption of an intention on the part of the testator to adeem the legacy, while such a payment made to a person not in the relation named will not raise such a presumption, but the intention to charge the payment against the legacy must then be proved (40 Cyc., 1915-6, and cases cited).

In the opinion of the court, however, the intention of the parties is conclusively shown by the manner of the payment and the form of the receipt given for it by Mrs. Ellard, so long as that receipt is not set aside.

Under the common law the mere expectancy or chance of succeeding to an estate is held not to be the subject of release or assignment (*Needles v. Needles*, 7 O. S., 432), but that rule has been relaxed in equity (*Rosenthal v. Mayhugh*, 33 O. S., 168). And an heir apparent or one who is named as a legatee under the will, who has received a valuable consideration from the ancestor or testator under an agreement by him that same be

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charged against his future interest in the estate, is held to his contract by way of estoppel.

A case directly in point is that of *Goodson v. Goodson*, 12 C.C., (N.S.), 158.

Other cases where such estoppel is held are: *Low v. Low*, 77 Me., 37; *Callicott v. Callicott*, 43 Southern Rep., 616 (Miss.); *Vreeland v. Vreeland*, 56 Atl., 1089; *Re Garcelon's Est.*, 32 L. R. A., 595.

In the opinion of the court, therefore, it is the duty of the executor in the distribution of said estate to charge against the share of Mrs. Ellard the sum of two thousand dollars. Decree accordingly.

#### **LIABILITY FOR EXPLOSION FROM LEAK IN GAS PIPE WITHIN THE CURB LINE**

Court of Appeals for Columbiana County.

**MARION COOPER V. THE TRI STATE GAS COMPANY.**

Decided, April 8, 1914.

*Gas and Inspection of Gas Pipe—No Continuing Liability on Gas Company to Keep Pipes in Safe Condition Within the Curb Line. When—Pleading—Failure of Notice as to Leak.*

1. A gas company engaged in furnishing natural gas to the inhabitants of a municipality for consumption by means of lines of pipe laid in the streets and to the curbs thereof, where such pipes are connected with pipes conveying such gas over the premises and into the dwelling-houses of consumers thereof, such pipes from the curb into the dwelling-houses having been installed and being now maintained and controlled by such property owners and consumers, the same having been properly inspected before gas was turned in, is not thereafter required to inspect the same, nor is there a continuing liability on the part of such company to see that such piping is kept in safe and proper condition for the transportation of such gas.
2. In order to constitute a cause of action against a gas company by reason of failure to inspect gas pipes installed, owned, maintained and controlled by a consumer of gas leading from the curb into the dwelling-house of such consumer, where damage to such con-

sumer was caused by leaks in such pipes owing to natural decay or other faulty condition arising after a number of years of use thereof, there must be sufficient facts alleged to show notice to the company of such defective condition, or facts from which an inference of duty to inspect such pipes arises either from contract, custom or franchise.

*W. F. Lones*, for plaintiff in error.

*Brookes & Thompson and William C. O'Neill*, contra.

NORRIS, J.; METCALFE, J., and POLLOCK, J., concur.

Plaintiff in error was plaintiff below and filed an amended petition in the lower court, to which the defendant demurred on the ground that the petition did not state facts sufficient to constitute a cause of action.

The court sustained the demurrer, and the plaintiff, not desiring to plead further, entered up a judgment dismissing the case. Error is assigned in this court to sustaining that demurrer.

The petition, in substance, states:

The defendant is a corporation engaged in the business of supplying natural gas to the citizens of the city of Wellsville and other cities for heating and lighting purposes, and has gas pipes laid in the streets of said city from which gas is supplied to the individual houses by service lines extending from such pipes in the street to the houses of the inhabitants; that the plaintiff was the owner of a lot or tract of land upon which her dwelling-house was situated in the city of Wellsville, and that the defendant had been supplying her with natural gas for use in such dwelling-house for a number of years; that the gas was conducted from the lines in the street over her land to her house, and her house was about eight feet from the line of the street, she paying for the gas a certain rate per thousand feet; that the defendant maintained and owned such of the pipe line as were constructed in the street up to the curb in front of plaintiff's property, and the plaintiff installed, maintained and owned the service pipe line leading from the curb to and upon the lot upon which her dwelling was located, and through said lot into her said dwelling-house; that on or about the 17th day of January, 1912, owing either to natural decay or other faulty condi-

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tion, said service pipe so installed by plaintiff, began to leak at a point on plaintiff's said lot, about one foot from her said dwelling-house, and between the meter and her said dwelling-house, and the gas escaping therefrom percolated through the ground into plaintiff's dwelling-house, where it exploded and caused the damages complained of.

The plaintiff further says that as far as she knows the defendant had no actual knowledge of the faulty condition of said service pipe or that said gas was escaping from the same; but alleges that it was the duty of said defendant to have inspected said service pipe at the time the same was installed on her said premises; and to have inspected the same from time to time thereafter, and by the exercise of ordinary care in inspecting said service pipe, said defendant would have discovered the faulty condition of the same in time to re-place said service pipe and prevent said explosion. And she says that the defendant negligently and carelessly failed and neglected to so inspect said service pipe on said plaintiff's said premises at any time, and negligently and carelessly continued to deliver its gas through the same to plaintiff's said premises; and by reason of the said negligence the gas was permitted to escape through said pipe and caused the damages aforesaid.

It will be observed that there are no facts alleged in this petition from which the duty of the defendant company to inspect these lines arises. Plaintiff alleges that the company did not inspect, but alleges no facts by way of contract or custom, or other facts from which it might be said that a duty arose to inspect the service lines in her dwelling-house, or other dwelling-houses in the city of Wellsville. Then the question arises whether, from the situation and from the facts set out in this petition, it can be said that a duty arose on the part of the gas company to inspect the lines in the dwelling-house, and on the private premises of the owners of these lines inside the curb.

We have been cited to a number of cases which we have examined, but there is no reported case in this state, so far as we have been able to find, or have been referred to upon this question.

The first case upon which counsel for plaintiff in error rely, is the case of *Washington Gaslight Company v. District of Columbia*, 161 U. S., 316. The first proposition of the syllabus in that case is as follows:

"It is the duty of a gas company to supervise and keep in repair a gas box which is part of the apparatus of the company, and is placed in a sidewalk to afford means for turning on or off the gas from a house, when it has entire control of the box to the exclusion of the property owner, although the latter is required to pay for the gas box and connection."

In this case it appears that a deep and dangerous hole was at this place where the gas box was, and that a resident of the District of Columbia fell into this hole through its not being properly guarded or covered, and recovered damages against the city of Washington. Then the city, under its arrangement, the franchise under which the gas company had a right in the city, brought suit to recover over the amount that had been allowed to the plaintiff in the first case.

Justice White, in stating the opinion, says:

"It was proved on the trial of the case to have been an open gas box placed and maintained in the sidewalk by the gas company for its own use and benefit, and which it was its duty to repair; that this duty had been grossly neglected by allowing the box to remain unrepaired, thus causing the injury for which the city had been held liable. The declaration, moreover, averred notice to the gas company and the fact that adequate opportunity was given it to defend, and the failure of the gas company to act in defense of the suit," and so on.

It seems to us there is a vast difference between that case and the one we have set forth in this petition. The court says in the opinion:

"It would be unreasonable to infer that Congress when it authorized the use of the streets or sidewalks for the purpose of the gas company's business, contemplated that the city of Washington or its successor, the District of Columbia, should keep in repair such apparatus, the continued location of which in the sidewalks of the city was permitted, not only as an incident to the right to make and sell gas, but also for the pecuniary benefit of the gas company."

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The next case referred to is the case of *Gas Company v. Creighton*, 183 Federal, 552, and the point in that is stated in the first proposition of the syllabus in the Circuit Court of Appeals of the Sixth Circuit:

"A gas company, which through its pipes supplies gas to a house and has control of the apparatus for cutting it off, when notified that gas is escaping in the house and informed of injury and danger to inmates therefrom, owes a duty to the occupants of the house to exercise reasonable diligence in shutting off the gas therefrom, and it is immaterial that the pipes where the leak occurred were owned by the owner of the house."

And that rule would apply here if the gas company had been notified by the owner of the house of this defective pipe, and that gas was escaping therefrom; but it does not seem to us to touch the question of the duty of the gas company, in the first instance, to inspect it from time to time for the purpose of ascertaining the condition of the pipes without any information from the property owner. Another case cited is that of *Schmeer v. Gaslight Company of Syracuse*, reported in 42 N. E., 202, by the Court of Appeals of New York. Without taking time to read the syllabus, I read from the opinion of Justice Peckham, on page 203:

"While this gas remained on the premises of the manufacturer, or while it was being conducted through its own pipes to different parts of the city, there can be no doubt that the company was bound to exercise vigilance to prevent injury to third parties from the dangerous qualities of the gas. The question is where its responsibility ended. The claim is made on its behalf here that such responsibility had certainly determined before this explosion occurred. It is urged that it had no responsibility for putting the piping into the house, as it was done by third parties under the employment of the owner; that it had no charge of such piping after it was fitted in the building; that the gas was turned on by third parties, without consultation with, or knowledge on the part of, the officers of the company, which simply was accustomed to, and in this case did, permit any one to turn on the gas after plans had been submitted to it, and a meter had been provided by it upon application."

In this case the other parties put the lines in the building, and without any inspection on the part of the gas company, it turned

on its gas and it resulted in an explosion and injury. Then they further say on the question, after holding that under these circumstances it was a question for the jury and the gas company might be liable, speaking of the delivery of the gas:

"In making that delivery it is not an insurer, but is simply bound, in such a case as this, to that degree of care which the nature of the article it deals in, and the consequences to be apprehended from an accident, reasonably call for. Nor do we assume to say that when once the piping, in cases similar to this, has been fairly and properly examined previous to turning on the gas (if such examination by defendant's servants is called for at all), that thereafter there is a continuing liability on the part of the company to see to it that such piping is kept in proper condition. As the company has no control over the piping, does not put it in, and is not consulted about it, the principle upon which it might be held liable, in cases of this character, at the time of first delivery of gas, if no precaution were taken at all, is simply that it would have the right to refuse to turn on, or permit others to turn on, the gas for the supply of the applicants until properly assured of the condition of the piping in other portions of the building. Having become assured of it and the gas being on, it would not seem that the company ought further to be regarded as liable for the continuous good condition of the piping. Here we may justly say that to impose such a liability upon the defendant would clearly be unreasonable. It would render necessary the examination, at frequent intervals, of all the buildings in the city in which gas was used. This would be so onerous as to be practically impossible of execution, because of the expense to the company. The law ought not to and does not, exact an unreasonable amount of care from anyone. Under the restrictions, however, as above stated, we think the question of defendant's negligence was for the jury."

There are two other cases that still more firmly affirm the doctrine announced last in this case. I will read a portion of the opinion in the case of *State v. Gas Company*, 37 Atlantic, 264, Supreme Court of Maryland:

"All the cases agree that, to constitute a good cause of action, there should be stated and proved a right on the part of the plaintiff, and a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant, whereby the negligence and the injury there must be the relation of cause and effect."

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In this case there are no facts alleged in this petition upon which a duty upon the part of the gas company apparently arise. But it is alleged as a conclusion of law that there was negligence in not inspecting these premises without any facts alleged upon which it might be said such duty was imposed upon the gas company.

But the case of *Smith v. Pawtucket Gas Company* reported in the 57 Atlantic, 1078, decided by the Supreme Court of Rhode Island, is still stronger:

"The failure of a gas company, on introducing gas into a dwelling, to inspect pipes therein, which have long been out of use, but which were placed therein by the owner, and over which the company has no control, is not negligence, in the absence of any showing of a duty in such respect from contract, custom or charter."

And the court in the opinion say the same thing in stronger language:

"In the absence of any facts upon which to base an inference of duty, a court can not infer a general obligation to inspect pipes in a private house, which are not under the control of the company, and as to which it has no apparent relation other than the fact that its gas is to be used through pipes placed therein by the owner, as it has suited them to have them."

We have found no authorities, and none have been cited to us, in conflict with the principle announced in these cases, and none under the facts in this case as set out in this petition where a recovery was permitted against the gas company. It would seem a very onerous duty to impose upon gas companies, with their lines through the streets of a city, that from time to time, without notice, they should be called upon to inspect the service lines in the dwelling-houses and on premises of the parties who take gas from them, but we do think such duty is imposed on the property owner in reference to the use of this substance, owing to its somewhat dangerous quality, to exercise constant vigilance in the use of it to see that their own appliances are in proper condition for the safe use of it. That is the holding,

in substance, in the case of *Bartlett v. Boston Gas Company*, 117 Mass., 533, 539.

We do not think that the amended petition states a cause of action against the gas company. It follows that the judgment of the court of common pleas will be affirmed.

### **JURISDICTION TO REVIEW A FINAL DECISION OF THE PROBATE COURT.**

Court of Appeals for Cuyahoga County

THE W. M. SOUTHERN REALTY COMPANY V. A. A. SCHMIDT ET AL.

Decided, March Term, 1914.

*Appeals in Road Cases—Abutting Owner Dissatisfied With Compensation Awarded—Trial Had Before the Probate Court—Appeal to the Common Pleas—Right of a Reviewing Court to Reverse for Error which the Trial Court Could Have Corrected—Evidence as to Sales in the Neighborhood.*

The right of the court of common pleas, under the provisions of Section 7093 of the General Code, to review the final decision of the probate court in appeal by claimant for compensation and damages in road cases, is not limited to the right of the probate court to grant a new trial for misconduct of the jury, but the common pleas court, upon petition in error, is required by this section to review the entire proceedings of the probate court and reverse the final decision of that court for error that occurred in its proceeding which affect the substantial rights of the party complaining.

*Howell, Roberts & Duncan*, for plaintiff in error.

*Cyrus Locher*, Prosecuting Attorney, and *F. W. Green*, Assistant Prosecuting Attorney, contra.

POLLOCK, J.; METCALFE, J., and NORRIS, J., concur.

Proceedings were instituted before the commissioners of Cuyahoga county for the establishment of a public road through the lands of plaintiff in error and others.

The viewers in that proceeding made their report establishing the road, and allowing to plaintiff in error compensation for the

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land taken and damages for the remainder, and this report was affirmed by the commissioners.

Plaintiff in error being dissatisfied with the compensation allowed it for the land taken and damages given for the remainder appealed to the probate court from the action of the commissioners affirming the report of the viewers as to the compensation and damages allowed him.

Trial was had before the probate court and a jury resulting in a verdict for a less sum than that allowed by the viewers. A transcript of all the evidence introduced in the trial in the probate court was signed by the probate judge and filed in the case as a bill of exceptions.

Error was then prosecuted to the court of common pleas of this county, and there the judgment of the probate court was affirmed, and error is prosecuted to this court to reverse the judgment of the court of common pleas and the probate court.

The errors complained of in the trial of the cause in the probate court are—

First, improper rejection of evidence offered by plaintiff in error in the trial of that action.

Second, improper admission of evidence offered by defendants in error in that action.

Third, errors in the charge of the court respecting the evidence so admitted.

These are the errors urged here for a reversal of the judgment of the courts below.

It is urged by the defendants in error that the court of common pleas had no jurisdiction to review the final decision of the probate court for any of the errors appearing in the record, and for that reason the petition in error in this court should be dismissed.

Section 7083 of the General Code provides for a jury trial to determine the compensation to be paid for the property taken and the damages to the residue, and a return of the verdict by the jury. Upon the return of this verdict the probate court is not authorized to render judgment on the verdict, but the court has no further duties to perform in these proceedings, except to render judgment for costs, make a record of the proceedings

and transmit to the county auditor the original papers and the transcript of the proceedings before the court, unless the verdict is attacked for misconduct of the jury; in which event the probate court may set the verdict aside and grant a new trial.

The last sentence of the section of the code just referred to is as follows:

"A new trial shall not be granted except for misconduct of the jury, nor shall an appeal except by petition in error as hereinafter provided be taken to another court."

Section 7093, which is a part of this special proceeding, provides for the review of the final decision of the probate court on error, as follows:

"The final decision of the probate court, made under the provisions of this chapter, may be reviewed, upon a petition in error, by the court of common pleas of the proper county, but shall not be reversed for any defect in form if found to be substantially correct."

It will be observed that a new trial can only be granted by the probate court for misconduct of the jury, and the defendant in error claims that the right granted to the court of common pleas, by the above section, to review and reverse the final decision of the probate court, is limited to the power of the probate court to grant a new trial, and that the common pleas court can only reverse the case upon the grounds of misconduct of the jury, and as no motion for a new trial was filed on that ground in probate court, or no claim made in that court that there was misconduct of the jury, that the common pleas court had no jurisdiction in this action.

The right to prosecute error in any case exists only when conferred by statute. *Lafferty v. Shinn*, 38 Ohio St., 46-48; *Young v. Shallenberger*, 53 Ohio St., 291-302.

The Legislature, when it creates the right to review upon an action in error, can limit or enlarge that right as it deems best.

In the opinion in the case of *Canfield v. Brobst*, 71 Ohio St., 45, Price, Justice, said:

"The right to prosecute error to a judgment of a court is purely statutory, and if such remedy is not provided by statute,

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none exists. Moreover, where the statute provides the right of review on error, it may fix such conditions to its exercise as the Legislature, in its wisdom, may adopt."

When the Legislature gave the right of appeal to the probate court from the compensation and damages allowed the landowner in proceedings of the commissioners to establish a public highway, it limited the right to prosecute error from the final decision of the probate court to the provisions made in that special act.

Then we must look to Section 7093 to determine the extent of the right given the common pleas court to review the final decision of the probate court. That section provides that the final decision of the probate court may be reviewed in the court of common pleas, and the only restriction placed upon its power to review for error occurring in the probate court is that it shall not reverse for any defect in the form of the final decision, if found to be substantially correct.

It is an elementary principle that remedial statutes shall receive a liberal construction. *Railroad Company v. Sullivent*, 5 Ohio St., 276-279.

Keeping this principle in mind and looking to this section, we find that it gives full power to review the final decision of the probate court and reverse it for errors which it may find that occurred in the trial, if they substantially affect the rights of the party.

It is true that the general policy of the Legislature has been to restrict the right of the reviewing court to reverse for errors that the trial court could have corrected by granting a new trial, but it can not be doubted that the Legislature has power to enlarge the right of the reviewing court to errors other than those which the trial court might have corrected. To limit the right of the common pleas court, under this section, to reverse the final decision of the probate court for error in granting or refusing a new trial, would be limiting the right of review granted by this section beyond the plain meaning of its terms.

For these reasons we think that the common pleas court had authority to review the proceedings of the probate court in the

admission and review of testimony and, if errors are found which substantially affect the rights of the party, to reverse for such errors.

This brings us to a consideration of the errors claimed to have occurred in the introduction of evidence on the trial of this case.

The first error complained of is in the court's permitting W. S. Reed, a witness on behalf of the realty company, upon cross-examination to be asked what he paid for seventeen lots purchased by him, and over the objection and exception of plaintiff in error to give the purchase price of \$130; and again in permitting the witness, H. J. Sheets, on cross-examination to be asked if he knew the lots that Reed bought were bought for \$125 apiece, and after the introduction of this testimony Mr. Southern, plaintiff in error, was called as a witness and was asked on cross-examination what he sold Lot No. 162 for. This was objected to by the defendant and the objection sustained.

This brings us to a consideration of when the price of specific sales of property can be proven in a trial involving the question of real estate sought to be taken for public purposes.

The question asked Southern was an effort on direct examination to prove the the selling price of another lot in the neighborhood, as tending to establish a basis for determining the value of the property sought to be appropriated. There is some conflict in authorities on this question, but we think the great weight of authority is against the introduction of this evidence.

But the questions asked the other two witnesses on cross-examination were intended to test their knowledge of the value of property, and the value that should be given to them as expert witnesses. The rule seems to be almost universal that this can be done. On these questions we call attention to the following authorities: *Lewis on Eminent Domain*, Section 435; *Railway Co. v. Vickory*, 26 Pac., 498; *Railway Co. v. Stewart*, 28 Pac., 1017; 1 *Elliott on Evidence*, Section 180; *Railroad Co. v. Gorsuch*, 8 C.C.(N.S.), 297; *Railroad Co. v. Weildenmann*, 94 Pac., 146; *Union Pacific R. R. Co. v. Stanwood*, 91 N. W., 191.

There is a further complaint made that in the cross-examination of Mr. Sheets, before referred to, the price paid for the Reed lots was misstated. The witness Reed had a short time

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before testified to the correct price, and the jury would not be deceived to the substantial prejudice of the plaintiff by the error committed in asking the question.

It is further complained that the defendant in error asked on cross-examination the witness if he did not know of one hundred and forty-four lots in this allotment, including the ones in controversy in this action, had been appraised by appraisers appointed in a proceeding in the court of common pleas at less than \$100 a lot; and the question was repeated to a second witness.

Neither of the witnesses seems to have known of this appraisal and the value placed thereon, and there was no evidence of this fact except the question asked by the attorney. The court should not have permitted an answer to this question, and it should not have been asked the second time. But it could not influence the jury so as to affect the plaintiff's substantial rights, and for this reason it was not prejudicial error. The jury would understand that they must not consider the value introduced in a question of counsel as proof of the value of the property in dispute.

As these are all the errors complained of, the judgment of the court below is affirmed.

**STATUS OF CAUSE AFTER REVERSAL OF ORDER REFUSING  
TO SET ASIDE A DEFAULT JUDGMENT.**

Circuit Court of Cuyahoga County.

ROSE CONNORS, EXECUTRIX, ET AL V. GEORGE RACKLE ET AL.\*

Decided, February 5, 1912.

*Trial of Original Action After Reversal by Higher Court—Death of  
Party After Reversal—Revivor of Original Action Necessary.*

1. Where a judgment of the common pleas court, refusing to vacate a default judgment, affirmed by the circuit court, is reversed by the Supreme Court and the cause is remanded to the common pleas court for further proceedings according to law, it is error for the common pleas court to enter judgment on the mandate of the Supreme Court vacating said default judgment without hearing and determining whether grounds for vacation and a valid defense exist.
2. Upon death of one of the parties to a judgment after its reversal and remand to the trial court for further proceedings it is error to proceed with such new trial until the original action is revived.

*Henry & McGraw and McGrath & Stern, for plaintiffs in***ERROR.***F. M. Cobb, Skiles, Green & Skiles and R. B. and A. G. Newcomb, contra.*

NIMAN, J.: WINCH, J., and MARVIN, J., concur.

The action in the court of common pleas, out of which this proceeding in error arises, was brought by the filing of a petition to vacate a certain judgment, rendered as upon default, in another action in said court.

Proceedings were had in the court below which resulted in a finding that the plaintiffs were not entitled to the relief prayed for, and a dismissal of their petition. This court affirmed the judgment of the court of common pleas, but the Supreme Court

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\*Affirmed without opinion, *Rackle et al v. Connors, Executrix, et al*, 87 Ohio State, 518.

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reversed this court and the court of common pleas in *Rackle et al v. Connors et al*, 84 O. S., 473.

The decision of the Supreme Court embodied in the journal entry is in the following language:

"This cause came on to be heard upon the transcript of the record of the Circuit Court of Cuyahoga County, and was argued by counsel. On consideration whereof, this court being of opinion that in the original action the cause had not, prior to the trial thereof by the court of common pleas, and entry of judgment therein, been especially assigned for trial out of its regular order within the meaning of Section 5134, Revised Statutes, nor assigned for trial to a jury in series, and the trial thereof, by said court was before the action regularly stood for trial; and the court being further of the opinion that the plaintiff in error's contention in the present action is not *res adjudicata* because of the overruling of his motion to vacate judgment to be found at page 86 of the printed record, and marked 'defendant's exhibit 3.'

"It is further considered and adjudged that the judgment of the circuit court be, and the same hereby is, reversed, for error in affirming and not reversing the judgment of the Court of Common Pleas of Cuyahoga County in said case of *Rackle et al v. Connors et al*.

"And proceeding to render the judgment which the said circuit court should have rendered it is considered and adjudged that the said judgment of the court of common pleas be, and the same is hereby reversed, and said cause is ordered remanded to said Court of Common Pleas of Cuyahoga County for further proceedings according to law."

Upon receipt of the mandate of the Supreme Court, the common pleas court made the following order:

"This cause came on to be heard upon the special mandate and order of the Supreme Court of Ohio entered at the January term, A. D. 1911, of said court, to-wit, on May 9th, 1911, and proceeding to render the judgment which this court should have rendered in this cause, this court finds that the trial on February 3d, 1908, of cause No. 102,463, on the docket of this court and entitled '*James W. Connors v. George Rackle et al.*' was irregular in that it was had before said cause regularly stood for trial, and that a valid defense to said action has been shown; and it is therefore ordered, adjudged and decreed that the plaintiffs are entitled to the relief prayed for in their peti-

tion and that the judgment rendered by this court on February 3d, 1908, in the sum of two thousand five hundred dollars (\$2,500) and costs in said cause No. 102,463, be, and the same is hereby suspended and a new trial granted in said cause; and it is further ordered that in said cause No. 102,463 leave be granted to the defendants therein to plead and make their defense in said cause, and that the trial of said cause proceed in the manner provided by law."

By this proceeding in error a reversal of the foregoing order of the court of common pleas is sought, and two grounds are urged in support thereof:

1. That the court determined the issues upon the petition to vacate and subsequent pleadings, without a retrial thereof.
2. That James W. Connors, the plaintiff in the original action, and the defendant in the petition to vacate the judgment, died while the proceeding in error was pending in the Supreme Court, and the order complained of was made without having the action revived. Both of these contentions we hold to be well founded.

The essence of the order of the Supreme Court was that the judgment of the court of common pleas be reversed and the cause remanded for further proceedings according to law, and since the judgment reversed consisted of a dismissal of the petition, the order of the Supreme Court merely restored the action to its status before the judgment of the court of common pleas was entered.

A proceeding to vacate a judgment involves a determination of whether or not the grounds on which the vacation is sought exist and the existence or non-existence of a valid defense to the action. This is true whether the proceeding is by motion or petition. Where the issues are joined upon a petition to vacate a judgment, there must be a trial, both upon the ground for vacating the judgment and the existence of a valid defense to the original action.

These propositions are affirmed by McIlvaine, C. J., in *Watson et al v. Paine*, 25 O. S., 340, in the following language found on page 344:

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“When a proceeding by petition or by motion to vacate or modify a judgment is instituted, under Section 535 or 536, the first thing to be done by the court is to try and decide whether or not a ‘ground’ to vacate or modify exists (Section 537.) ‘The grounds’ referred to in this section are those enumerated in the nine subdivisions of Section 534. In some cases, the question thus tried and decided, can be determined by inspection of the record; in others, the testimony of witnesses must be heard. But in all cases this question must be tried and decided by the judge or judges. When the evidence of ground to vacate or modify is thus decided, the case is not yet ready for a final judgment of vacation or modification. Before such judgment can be entered, if the petition or motion be filed by the defendant in the original action, it must be adjudged that there is a valid defense to the action (Section 538). In order that the validity of the defense may be adjudged, an issue or issues should be made up by proper pleadings. If the proceedings to vacate or modify be by motion, the defendant should be required to file his answer to the original petition with leave to the plaintiff to reply. If the proceeding be by petition, in which the matters of defense are set forth in issuable form, it would be sufficient, no doubt, to take issue thereon by reply or demurrer. When the issue is thus made up, it should be tried as in other cases.”

In support of these principles see also *Ralston et al v. Wells*, 49 O. S., 298; *Follett v. Alexander et al*, 58 O. S., 202.

The court below heard no evidence in support of, or against, either of the essential facts necessary to secure a vacation of judgment. The journal entry shows that the cause came on to be heard, not on the evidence, but on the special mandate and order of the Supreme Court. This is a sufficient answer to the suggestion of counsel for defendants in error that this court is not at liberty to go into the question as to what evidence was presented in the court of common pleas, and that it is always presumed that the court when it makes a finding had before it proof of facts necessary to sustain its finding, and upon which the judgment was rendered.

In our opinion the court of common pleas was in error in making its order without a trial or hearing and on the strength of the mandate of the Supreme Court.

The second ground of error complained of is supported by the expression of the court in *Williams v. Englebrecht*, 38 O. S., 96, where it is said on page 97:

“Notwithstanding the death of the plaintiff in error after the assignment of errors and before final judgment, the judgment of reversal is valid and effective. By relation, the judgment of reversal takes effect as of the date of the commencement of the proceedings in error.

“True, the original action must be revived before a new trial can be had in the court below: but such revivor may be had in the court to which the cause has been remanded for a new trial. See *Block v. Hill*, 29 O. S., 86: and *Foreman v. Haag*, 37 O. S., 143.”

It is urged by the defendants in error that the order the reversal of which is sought in this proceeding, is not a final order.

We think this contention is refuted by *Braden v. Hoffaman*, 46 O. S., 639, where it was held:

“An order of the court of common pleas, made on motion of the defendant, and vacating a default judgment entered at a previous term for irregularity in obtaining the same, is an order affecting a substantial right made upon summary application after judgment, and may be reviewed, vacated, or modified for errors appearing on the record.”

The judgment of the court of common pleas is reversed and the cause remanded for further proceedings according to law.

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**AN ABANDONED BURYING GROUND REVERTS TO  
FORMER OWNERS.**

Court of Appeals for Licking County.

**CITY OF NEWARK V. HARRIET B. CRANE ET AL; AND CITY OF NEW-  
ARK V. JAMES W. BURNETTE ET AL.**

Decided, May, 1914.

*Land Dedicated for a Specific Use Can Not be Diverted to Other Uses  
—Municipality Can Not Hold as Trustee and Adversely—Fee Re-  
mains in the Heirs of the Patentee And Upon Abandonment of  
the Original Purpose of Dedication the Land Reverts to Them—  
Common Law Dedication—Statute of Limitations—Adverse Posses-  
sion.*

1. Where an owner dedicates land to the public for a particular use, specifying the use and imposing restrictions for the dedication as expressed the land can not be applied to any other use or the restrictions disregarded.
2. A city holding land as trustee for the use of the public as a cemetery can not, at the same time, hold it adversely and for its own benefit.
3. Where land was dedicated to the town of Newark for a burying ground, and the city council of said town subsequently passed an ordinance prohibiting any further burials in the land so dedicated and ordering the removal of the remains buried therein, the ordinance was a valid exercise of the police power of the city and operated as a complete abandonment of the dedicated use and the land would revert to the original owner, or his heirs. When the property is no longer desired, or the purpose for which it was dedicated attainable, it will revert to the dedicator.
4. Upon abandonment by a town of the public purpose of the dedication of the land, the property reverts to the original donor.
5. Where a city or town has by its own act abandoned the use and violated the conditions specified in a deed, it can not retain the grounds for any other purpose.
6. That a city may acquire title to land under the statute of limitations, by such adverse possession as is necessary to convey such title to land is not doubted; but the very foundation elements of adverse possession are wanting when the only possession is permissive possession for a dedicated use and while the city holds control of these premises as a grave yard the defendant could not take possession.

7. A common law dedication does not convey a fee.
8. In the Burnette case the fee in the land never passed out of the heirs of the patentee, but were subject only to the use of the public as a cemetery, and where the city abandoned that use the premises revert to the descendants of the patentee free from the dedicated use. Such dedication, if there were any dedication, was a common law dedication, and its use would be merely permissive, and not adverse and the town or city of Newark would have no title and no other possessory rights; and the use and control of the grounds was not adverse to the dedicated use. In such case its use would not start the statute of limitations. Nothing but an open, notorious, visible, hostile and inconsistent act of possession could have that effect.

*Ralph Norpell, City Solicitor, and Fitzgibbon, Montgomery & Black, for plaintiff.*

*Owen Nash and Craighead & Van Pelt, contra.*

VOORHEES, J.; SHIELDS, J., and POWELL, J., concur.

These cases were submitted together.

It will be sufficient in order to present the real issues in this case to state the following facts:

In January, 1801, a patent was issued to John Cummings, John Burnette and George W. Burnette, for section four, township two, range twelve, containing 4220 acres of land, and the premises embraced in the controversy in this suit, that is, the grave-yard, were a part of said section.

On May 15 and 19, 1814, John and George W. Burnette having died, the heirs of George W. Burnette conveyed their interest in said premises to John N. Cummings and John W. Burnette and Harriett Burnette, heirs of said John Burnette.

On December 6 and 14, 1814, John W. and Harriet Burnette and John N. Cummings, deeded to William C. Schenck an undivided interest in said land, amounting to a one-third interest in the whole tract. The recitals in this deed and the other deeds mentioned exhibit the chain of title and the amount of their respective shares, and show the relation of the parties and their respective shares in said land.

On June 20, 1817, an amicable partition suit was begun between Cummings, Schenck and James W. and Harriet Burnette, for the partition of the residue of the lands which remained

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unsold. This land included both inlots and outlots in the town of Newark, Ohio. It is not claimed that the lands known as the grave-yard were set off to anybody in said partition proceedings. The plat in partition record A, June term, 1817, of the Court of Common Pleas of Licking County, Ohio, page 7, attached to the record on page 9 of the bill of exceptions shows the old grave-yard.

The plat on page 7 in the record of said partition suit, is the only one of importance in this case. This plat shows the shape and boundaries of lot F, which was set off to the Burnettes, and which cornered on the grave-yard. This plat also shows the three-cornered strip subsequently deeded to the town of Newark by Crane and wife, in 1848, "for the sole purpose of being used as a burying ground for the use of said town of Newark and for no other purpose whatever."

In all these conveyances and proceedings the body of the grave-yard remained unchanged and undisposed of. Just when the grave-yard was originally laid out as such is not disclosed, but it was a grave-yard in 1871. It is not contended that it was ever deeded to any person or association for that purpose. The only deed is for the small three-cornered addition made in 1848. It is not contended or claimed that there was any statutory dedication or any proceeding to condemn or appropriate this ground for a grave-yard and the right of the public to use it for such purposes arises, if at all, by way of common law dedication, based on the fact that the original owners permitted it to be used for that purpose.

On February 8, 1826, the town of Newark was incorporated, and the municipal authorities in November, 1868, prohibited any further burials in this grave-yard.

On July 29, 1875, an ordinance was passed by the council of said town, among other things providing for notices to friends to remove the bodies buried therein by November 1 of that year, and authorizing the cemetery trustees to proceed after that date to have the bodies and tombstones removed.

On November 4, 1875, a resolution was passed referring the matter of removing the remains of parties buried in the old grave-yard to a special committee consisting of the cemetery trus-

tees and three citizens, which would indicate that the bodies had not been removed.

On September 20, 1877, a further resolution was adopted by said council, reciting the dilapidated condition of the cemetery, *et cetera*, and directing the trustees to expend some money to repair and improve the cemetery. These proceedings were reported to the cemetery board and it employed two persons to make a plat of the ground and graves, taking care to preserve the monuments and tombstones, so that the same and the remains might be removed and the ground leveled off. A plat was prepared, beginning with the year 1850, under date of 1878.

On April 14, 1882, the board of education of Newark instituted a proceeding against the trustees of Newark township and the city of Newark and the unknown heirs of Cummings, Burnette, Crane and Schenck, to condemn the ground known as the old grave-yard for a school house site. A jury was impaneled and a verdict returned assessing the value of the premises in three tracts aggregating \$7,500. In that proceeding the then solicitor of the city filed what he called an answer, asserting that the city was the real owner.

The heirs of Cummings, Burnette, Crane and Schenck, also filed an answer alleging that they were the owners in fee of the property. The court ordered that when the money was paid in the respective rights thereto should be determined. The board of education never paid in the money and there the matter rested.

In 1888 the picket fence, which had been put up in 1878, was removed and put up in Cedar Hill Cemetery. Instead of removing the grave-stones, as had been ordered in 1878, those doing the work laid them down in the graves and covered them up. One monument still remains standing. How many old graves are still in the ground can not be now definitely known; but the testimony shows that many of these graves and grave-stones are very, very old.

In the reply and testimony in the Crane case it was shown that most of all the burials in the cemetery were before the date of 1848, and Mr. Vanatta says, "that with no burials since 1860 or

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1868, very little can be left of any remains; all or nearly all have necessarily disappeared."

On September 11, 1905, the council of said city of Newark passed an ordinance selecting these grounds as a site for a proposed municipal hospital.

On March 6, 1906, these suits were brought by the city to quiet its alleged title in fee, claiming, in the Burnette case, that it has ever since November 20, 1868, been in the open, exclusive, adverse and visible possession of the premises involved in that suit (the Burnette suit), and has thereby become owner, and in the Crane case claiming ownership under the deed of the date of February 14, 1848. These claims the defendants absolutely deny.

In 1909, while these cases were pending and after the answers had been filed, the plaintiff city entered on the premises, laid cement walks diagonally across the same, built a fountain in the center; laid pipes, and strung electric wires, claiming that the premises had become a common and public park. These structures were put up on the premises for the purpose of improving them as the Sixth street park, as stated in the proceedings of the board of public service by the resolutions of July 6, 15 and 24, 1909. The photographs introduced in evidence tend to show the grounds now to be a park and that the city has completely abandoned the use of these premises as a cemetery.

The facts admitted in the pleadings may be summarized as follows:

In the Crane case:

1. Burials have been prohibited since 1850.
2. Burials were prohibited by ordinance in 1868.
3. The Crane deed of 1848 contained restrictions as to the use of the land, stating that it should be used for the sole purpose of a "burying ground, for the use of said town of Newark, and for no other purpose whatever."
4. That as early as 1850, Cedar Hill Cemetery was used.
5. That in 1868 and 1875 remains were ordered removed to Cedar Hill.
6. That the school board instituted proceedings in 1882 to appropriate said land for school purposes.

7. That fences around the grave-yard were ordered removed in 1888.

8. An ordinance was passed by the council to establish a hospital in 1905.

9. A resolution was passed by the council ordering that the remaining bodies and the tombstones be removed.

10. A fountain and other structures for a park were erected by the city.

11. Most of the bodies had been buried in said cemetery prior to 1848.

In the Burnette case:

1. Burials were prohibited as early as 1850.

2. Burials were prohibited by ordinance in 1868.

3. The premises were used as a burial place from 1817 to 1868.

4. Cedar Hill was established about 1850 and has ever since been continuously used as a grave-yard.

5. Burials in said cemetery in the Burnette lands or premises were prohibited in 1868.

6. All remains and tombstones were ordered removed in 1875.

7. Proceedings of the board of education to appropriate the premises for school purposes were instituted in 1882, but never completed.

8. The fences around said cemetery were removed in 1888.

9. Proceedings were had by council to appropriate said premises for a hospital site, but never consummated.

10. A fountain and other structures for a park were erected by the city on the premises.

It is unnecessary to go into detail as to the various acts and proceedings had by the town of Newark with reference to the lands and premises involved in these suits. For the purposes of this opinion, it will not be necessary to refer to the facts, ordinances, resolutions and acts of the town of Newark, further than to say that the *only deed* executed was the *Crane deed*, of 1848, for the three-cornered strip.

At the January term of the court of common pleas, to-wit, January 25, 1912, it was ordered, adjudged and decreed, among

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other things, that the petitions of the plaintiffs in cases numbered 13789 and 13790 be, and the same were dismissed.

The causes came into this court on appeal from the court of common pleas. They have been ably argued by council on both sides by briefs, as well as by oral argument. In the short time this court has had to consider the questions involved, and to assign reasons for its conclusion, it can not be expected that we will go into much detail in stating our conclusions.

By the deed executed in 1848, by Crane and wife to the said town of Newark, the three-cornered strip, shown by the plat, was deeded "for the sole purpose of a burying ground and for no other purpose whatever." This conveyance was to the municipal corporation of the town of Newark, for a public purpose, namely: for a burial ground, and for no other purpose. The town of Newark abandoned said premises as a burial ground, as shown by the various acts of the municipality and, therefore, the title reverts to the original owners or their heirs, by the plain terms of the deed.

In the case of *South Park Commissioners v. Montgomery Ward & Company*, 93 N. E., 910 (248 Ill., 299), it was held:

"Where an owner dedicates land to the public for a particular use, specifying the use and imposing restrictions, if the dedication is accepted the land can not be applied to any other use or the restrictions disregarded."

In the case of *Kansas City v. Scarritt*, 69 S. W., 283 (169 Mo., 471), Syllabi 1 and 2 are as follows:

"1. A square was marked 'donated for grave-yard,' on an original plat filed by the owner with the recorder of deeds. Five years later a city was incorporated, including within its limits the grave-yard. *Held*: That the legal title to the square remained in the original owners, subject to the use of the public, for the purpose of dedication; it not having passed to the city by dedication, as the latter was not in existence at that time.

"2. A city holding land as trustee for the use of the public, as a cemetery, can not at the same time hold it adversely and for its own benefit."

*Mayor, etc., of City of Newark, New Jersey, v. Watson et al*, 56 N. J., 667 (29 Atl., 487), Syllabus 2:

"The plaintiff, a municipal corporation, held lands under a grant from the proprietors of East Jersey for burial purposes, to be appropriated for no other use or uses whatsoever. An ordinance of the municipality and an act of the Legislature prohibited the use of such lands for burial purposes. *Held*: That the title to the lands thereby reverted to the proprietors."

In the case of *Fulton (Village), Lessee of, v. John Mehrenfeld*, 8 O. S., 440, we find the following citations:

"Where land was dedicated to the city of Youngstown for a burying ground, and the city council of Youngstown subsequently passed an ordinance prohibiting any further burials in the land so dedicated, and ordering the removal of the remains buried therein, the ordinance was a valid exercise of the police power of the state and operated as a complete abandonment of the dedicated use, and the land would revert to the original owner or his heirs. *Young v. Commissioners*, 7 O. F. D., 171 (51 Fed. Rep., 585, 591), 1892; 1893, *Mahoning Co. (Comrs.) v. Young*, 9 O. F. D., 202, 206 (59 Fed. Rep., 96, 99; 8 C. C. A., 140; 16 U. S. App., 588).

"When the property is no longer desired, or the purpose for which it was dedicated attainable, it will revert to the dedicator." 76 O. S., *Railroad Co. v. City*, at page 504.

"Upon abandonment by a town of the public purpose of a donation of the lands, the property reverts to the original donors." 75 Miss., 846; *Patrick v. Y. M. C. A.*, 120 Mich., 185 (79 N. W., 208).

In the Crane deed, the language was: "for the sole purpose of being used as a burying ground for the use of the town of Newark, and for no other purpose whatever."

These authorities make it clear that when the city abandoned the use of the premises conveyed as a burying ground, and attempted to divert them, first, to a school house site, later to a hospital site, and afterwards to a park, the title reverted to the heirs of Mrs. Crane, the grantor.

The city has, by its own unequivocal acts, abandoned the use and conditions specified in the Crane deed, and can retain the ground for no other purpose.

The Burnette case:

As to the Burnette case, we find: That the fee in the land in this case never passed out of the heirs of the patentee. It

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has always been in them, subject merely to the use of the premises as a cemetery; that by plain and unequivocal acts, the city has abandoned that use; that the premises have reverted to defendants free from the dedicated use.

The dedication of the Burnette tract, in case No. 1300 (if there was a dedication), was a common law dedication, and its use was merely permissive and not adverse. When these graveyard grounds came into the corporate limits of the town of Newark, it had no title and no other possessory rights. The use and control of the grounds was not adverse but in entire harmony with the dedicated use. Hence, its use did not start the statute of limitations. Nothing but an open, notorious, visible, hostile and inconsistent act of possession on the premises could have that effect, and no such act was done, or is claimed to have been done.

In 1888 the city took the fence down, threw the premises open to intruders and trespassers, and never after that sought to guard or protect the grounds, or to respect their character and sacredness as a burial place. This was an abandonment of the dedicated use.

*Kansas City v. Scarritt*, 169 Mo., 471 (69 S. W., 283), *supra*:

"That a city may acquire title to land under the statute of limitations by such adverse possession as is necessary to confer such title is not doubted; but the very foundation elements of adverse possession are wanting when the only possession is permissive possession for a dedicated use. And of course while the city held control of this as a grave-yard, the defendants could not take possession."

*Patrick et al v. Y. M. C. A. of Kalamazoo*, 120 Mich., 185 (79 N. W., 208).

"A common law dedication does not convey a fee."

Syllabus 6, *supra*, is as follows:

"A church society, having accepted lands for a period of time under a common law dedication to its use, executed a quit-claim deed to a certain person who had previously purchased the reversionary interest of a part of the dedicator's heirs, and who conveyed the land to a Young Men's Christian Association, which built a valuable building on the land.

*Held*: No evidence of hostility and the assertion of an adverse claim entitling the association to claim the land as against the dedicator's other heirs by adverse possession."

Syllabus 7:

"After a church society had erected a building on a lot dedicated to the use of one of the first four religious denominations forming a society in the town and erecting a building on the lot, it conveyed the lot to a Young Men's Christian Association, which demolished the church building and erected a building adapted to its own wants.

*Held*: An abandonment of the use for which the lot was dedicated, entitling the holders of the reversionary interest to the lot."

*Campbell et al v. City of Kansas*, 13 S. W., 397 (102 Mo., 326, 343). Syllabi, 1, 2, 3, 4 and 5 are as follows:

"1. A square was marked 'donated for grave-yard' on an original plat, not assigned or acknowledged by the proprietors of a town-site, but filed with the recorder of titles by one of them, who soon after used it at a public sale of lots. The plat, and the use of the land for interments were acquiesced in by the proprietors. *Held*: Sufficient evidence of a dedication *in pais*.

"2. The donors of land dedicated to a city for a grave-yard have, while the public use lasts, no right to a concurrent possession subject to a reasonable use of the public, and can not maintain ejectment against the city to recover such a possession.

"3. Land dedicated to a city for a cemetery, which has no longer the character and name of a grave-yard, but is used as a public park reverts to the donor, who may recover in ejectment against the city, which in defense denies the abandonment.

"4. In such case, the question will not be considered whether the land can be appropriated and used for other charitable purposes germane to the original one, in accordance with the equitable doctrine of *cy pres*.

"5. In 1857, land in a city, dedicated and used as a cemetery was by ordinance 'vacated for grave-yard purposes.' In 1866, the council, by published notice, required all who had friends buried there to remove the remains. Many removals were made, but the majority of the remains were left to be taken away by the city. In 1869 it was used by the workhouse force, breaking rock. In 1870, earth was taken from it, and used too fill a street. In 1877, the city engineer was instructed by ordinance 'to grade the old grave-yard and get it into shape for a public park.'

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"This was done the next year. The grading went below all the graves, except, perhaps, a few in the lower part, on which four to ten feet of earth were placed. Trees were planted, grass grown, and walks laid out. It was named and recognized by the city as a park. No visible grave or monument remained. During the final grading, in 1878, the removal of the remains exhumed was stopped, and the bones of from eleven to eighty-four bodies were reinterred, in small boxes, as near the places from which taken as possible. Small stones, bearing numbers, but no names, were at these points either put five or six inches under ground, or they had sunk to that depth at the time of the trial, shortly before which the location of many of them was brought to light by agents of the city by 'prospecting through the park with a sharp iron rod.' *Held*: Sufficient evidence of abandonment."

Without pursuing the discussion further, we are of the opinion that the city or town of Newark has no right, title or interest in these premises, in either case, and that the petitions should be and they are dismissed, at the costs of the plaintiff.

It is therefore ordered by the court that said plaintiff remove all of said pipes, poles, electric wires, cement walks, and the fountain from said premises, and restore the same to the condition that they were in before such pipes, poles, electric wires, cement walks and fountain were placed in and upon said premises, and that the same be done within six months from the date hereof.

It is further ordered that a decree be drawn in accordance with the opinion of the court herein. Exceptions.

Motion for new trial, if one is filed, overruled. Exceptions. Ten days allowed for finding of fact and conclusions of law. Statutory time for bill of exceptions.

**ACTION AGAINST DEBTOR CORPORATION AFTER PROCEEDINGS IN INVOLUNTARY BANKRUPTCY ARE BEGUN.**

Circuit Court of Cuyahoga County.

**THE SUPERIOR CLOTHING COMPANY V. THE AMDUR BROS.  
COMPANY.**

Decided, February 13, 1912.

*Bankruptcy—Involuntary Proceedings—Before Adjudication Bankrupt  
May Maintain Suit.*

A corporation can maintain an action on a claim due it after proceedings in involuntary bankruptcy have been begun, but before adjudication and appointment of a trustee therein.

*S. A. Grossner, for plaintiff in error.**Emil Joseph, contra.*

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The sole question presented to this court on the argument and by brief is whether, after proceedings in involuntary bankruptcy have been begun against a corporation, but before adjudication and appointment of a trustee therein, said corporation can maintain an action on a claim due it.

We do not think this question was saved on the record in this case. It is not raised by any allegation in the petition or amended answer, nor is there any bill of exceptions showing the evidence taken on the trial, so that we do not know that it was raised in the evidence.

Two days after the trial, a motion for a new trial was filed, and the third day after the trial a motion to set aside the judgment was filed. The latter motion gives three alleged reasons for setting aside the judgment: first, that the plaintiff is not the real party in interest; second, that the note sued on had been transferred to a third party, and third, that the plaintiff had either filed a petition in bankruptcy or been declared an insolvent under the laws of the state of New York, and so could not maintain the action.

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Whether evidence was taken on the motion for a new trial, we do not know, but it appears that evidence was taken on the motion to set aside the judgment.

Said motion does not give any statutory ground for setting aside a judgment; it states certain facts which, perhaps, might have been raised on the trial, if the pleadings had been amended so as to raise issues involved in these facts.

There is a bill of exceptions, certifying that on the motion to vacate the judgment an agreed statement of facts was used, but it does not certify that said agreed statement of the facts was all the evidence on the hearing of said motion.

In this state of the record, it would seem idle to try to answer the question submitted on the hearing in this case, but we have examined the authorities cited and conclude that the law is correctly stated by Remington in his valuable work on Bankruptcy, in Sections 1119, 1120, 1121, 1123, as follows:

"The subject of the status of property after the filing of the petition is one upon which neither the law itself nor the decisions are clear, nor always consistent.

"But title does not vest until the trustee's qualification; meanwhile in law the title, although defeasible, remains in the bankrupt.

"The bankrupt himself is a *quasi* trustee of the property and its custodian and caretaker until a trustee, receiver, or some other officer of the court is appointed.

"In the meantime, the bankrupt has sufficient title to maintain suits in his own name, at any rate where no receiver has been appointed or where title and not merely possessory right is essential to maintenance of the suit."

See also *Rand v. Railway Co.*, 186 N. Y., 58.

The trial court seems to have followed the law as thus enunciated, and its judgment is affirmed.

**ACCEPTANCE OF BEQUEST NOT A BAR TO CONTEST  
OF THE WILL.**

Court of Appeals for Perry County.

SOLOMON E. SPANGLER v. JASPER C. BEARE ET AL.

Decided, May 2, 1913.

*Wills—Right of Legatee to Contest—Where Bequest Has Been Received  
and Afterward Returned—Charge of Court.*

The acceptance of a bequest of personal property does not bind the beneficiary not to contest the will, as in the case of the acceptance of real property, but the money or property so received may be returned to the executor and the legatee left free to contest the will.

*D. M. Barr and T. B. Williamson, for plaintiff in error.*

*John Ferguson and Stanley B. Crew, contra.*

BY THE COURT (VOORHEES, SHIELDS and POWELL, JJ.)

This was an action commenced in the court of common pleas by the plaintiff in error, who was plaintiff below, against the defendants in error to set aside the will of one Emanuel Beare, deceased, which before that time had been admitted to probate and record in the probate court of this county.

The petition was in the usual form, alleging that the paper writing, purporting to be the will of said Emanuel Beare, deceased, and which had been admitted to probate and record in said probate court was not the last will and testament of Emanuel Beare, deceased, without specifying any ground or reason why the same was not such last will and testament.

An answer was filed, denying the averments of the petition, and alleging as a special defense that by the terms of such will, as probated, Solomon E. Spangler was given a legacy of \$4,000, which legacy, with its accumulated interest, had been received by him from the defendant, Jasper C. Beare, as executor of the will of said Emanuel Beare, deceased, and who had thereupon receipted for the same in full settlement of all his rights under such will as a legatee.

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To this answer a reply and an amended and a supplemental reply were filed, the effect of which was to tender back to the said executor the amount of money received by the plaintiff, who admitted its receipt, but who claimed that such acceptance was procured by fraud and misrepresentation of the other defendants named in the proceedings, which money, however, the executor refused to receive, when the same was deposited with the clerk of courts as a tender for that purpose.

The question presented to the jury for determination was whether or not the testator, Emanuel Beare, had executed another and subsequent will to the one that had been admitted to probate, by the terms of which the former will had been revoked, and that the same had never been republished as and for his last will, and the same was therefore void.

Numerous errors as to the admission and rejection of testimony were insisted upon in this court. Also it is urged that the court erred in its charge to the jury, by which the plaintiff was prevented from having a fair trial. We have examined the entire record with reference to the assignments of error presented by the petition in error, and we are of the opinion that in the charge of the court there was error which was misleading to the jury and prejudicial to the rights of the plaintiff in error. The court charged in substance, and it is to be found on page 7 of the charge or 145 of the bill of exceptions, that if the jury find that plaintiff had accepted the \$4,000, and that such acceptance was not brought about by fraud and misrepresentation of the executor but was accepted by plaintiff without such fraud and misrepresentation that that would be the end of the case. Further, that the jury need not go into any further questions because the mere acceptance of the legacy under the will would bind plaintiff from making any contest in the court of common pleas at all. This court is of the opinion that this proposition is not the law in Ohio when applied to a legacy or gift of personal property, but is applicable only when the gift or devise is a gift of real estate. We are of the opinion that such acceptance of a legacy could be revoked and the money returned, whereupon the rights of the legatee to contest the will would stand

just as though no such payment had ever been made and we think that this charge is such error that the judgment of the court of common pleas should be reversed.

We have examined the whole record with reference to the other errors assigned and we find that, while there may have been other errors, yet we would not feel called upon to reverse the judgment upon them alone, and especially as the one specified is in our opinion sufficient to justify a reviewing court to reverse such judgment.

#### **DELAY IN CONFIRMATION NOT FATAL TO PROCEEDINGS IN FORECLOSURE.**

Court of Appeals for Hamilton County.

**JULIA MCGILL WALTERS V. EMIL HOMBERG: TWO CASES.**

Decided, July 15, 1914.

*Judicial Sales—Decree for. Does Not Become Dormant—Proceedings Not Affected by Long Delay in Confirmation—Statute of Limitations Not Operative as to Mortgages in Foreclosure—Formalities in Assignment of a Mortgage—Jurisdiction in Appropriation Proceedings—Sections 8510 and 8546.*

1. A decree for sale does not become dormant, and a plea of laches on account of a delay of fifteen years in applying for confirmation of a sale which was made in due course after the taking of the decree, does not lie in the mouth of the debtor who had failed to satisfy the mortgage and who raises no question as to the validity of the mortgage or the regularity of the proceedings in foreclosure with the exception of the delay in confirmation.
2. A plea that the value of the property involved in such a proceeding has greatly appreciated since the entering of the decree of sale, is of no avail where even the present value is insufficient to satisfy all the claims against it and leave anything over for the mortgagor.
3. The bringing of suit for foreclosure of a mortgage stops the running of the statute of limitations as to such mortgage.
4. Errors will not be deemed prejudicial where their avoidance would not have changed the result of the proceedings.

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5. The amendment of Section 8546, General Code, dispensing with witnesses and an acknowledgment to the assignment of a mortgage, does not go to the extent of causing the assignment to carry the legal title to the land conveyed by the mortgage, but to vest title the provisions of Section 8510 must still be observed.
6. There is nothing in the statute controlling appropriation proceedings which gives to the court in which they are instituted jurisdiction over the property to be condemned, to the exclusion of the jurisdiction of another court in which foreclosure proceedings, involving the same property, have been previously commenced and sale made but not yet confirmed.

*Frank Woodward and Hunt, Bennett & Utter, for plaintiff in error.*

*John E. Fitzpatrick and Gideon C. Wilson, contra.*

JONES, O. B., J.; SWING, P. J., and JONES, E. H., J., concur.

The first case was a foreclosure proceeding below, brought April 1, 1895, by William M. Ramsey, as guardian of Leora McCammon, to foreclose a second mortgage, recorded August 12, 1891, for \$500, and for the sale of a lot on the west side of Reading road north of Burnet avenue belonging to John McGill. There was a prior mortgage on same made by John McGill, then unmarried, to John Frankenberger, and recorded August 6, 1891, to secure a note for \$2,700 of that date payable in three years. This loan was made to John McGill by Emil Homberg who furnished the money and was at all times the beneficial owner of the note and mortgage. John Frankenberger had no interest therein except as trustee or agent of said Homberg. Said Frankenberger was a clerk in the office of Louis Reemelin, who was the attorney for the said Homberg in the preparation of said mortgage and in these proceedings up to the time of his death. Said note and mortgage were endorsed in blank by said Frankenberger at the time of their execution and were then delivered to said Homberg. Some time after the record of these two mortgages John McGill conveyed said real estate by deed duly executed and delivered to his Wife Julia McGill.

In this suit John McGill and Julia McGill, his wife and John Frankenberger were the original defendants and were duly served with summons, and were all in default for answer. Wil-

liam W. Ramsey, who had been appointed as guardian of Leora McCammon to succeed her former guardian, William M. Ramsey, deceased, was substituted as plaintiff in place of the original plaintiff.

Louis Reemelin, who had received from Emil Homberg said note and mortgage executed by John McGill to John Frankenger and endorsed by him in blank, was made a party and filed an answer setting up said mortgage and asking that the same be declared to be a first lien on said real estate superior to that of plaintiff, and that it be ordered first paid out of the proceeds of said sale.

On July 31, 1897, a decree was entered finding the amount due under plaintiff's note and mortgage \$606.66, with interest from March 1, 1896, and ordering that unless said amount was paid within thirty days defendants' equity of redemption should be cut off and an order should issue for the sale of said real estate free of the claims of all parties to said action; and finding that the mortgage to John Frankenger to secure a note of \$2,700 recorded August 6, 1891, was a valid, subsisting and first lien upon said premises, and that Louis Reemelin was the owner and holder thereof.

Defendants, John McGill and Julia McGill, having failed to pay the amount so found due, an order for sale was issued September 8, 1897, and October 19, 1897, a return on same was made by the sheriff showing that sale had been duly made and the real estate had been sold to Louis Reemelin.

No further step was taken in the case until December 20, 1912, when Emil Homberg was on his own application made a party and given leave to plead, and on March 19, 1913, filed a motion to confirm said sale. On or about February 1, 1912, Louis Reemelin died, leaving Evelyn Reemelin his executrix and sole devisee. On June 21, 1913, Emil Homberg filed an answer and cross-petition alleging that Louis Reemelin in his lifetime, subsequent to the return of the order of sale, sold and assigned to Emil Homberg said note and mortgage and all interest in said property, and prayed for a confirmation of sale to him as assignee of the purchaser. On the same day the death of Louis Reemelin was suggested to the court and Evelyn Reemelin, his ex-

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ecutrix, was made party and by leave filed an answer alleging and admitting the transfer of the Frankenberger note and mortgage by Louis Reemelin to Emil Homberger and disclaiming any interest adverse to Emil Homberg. Then Emil Homberg filed a motion to confirm the sale and distribute the proceeds.

On September 9, 1913, Julia McGill Walters, who it seems was formerly Julia McGill, filed an answer. This answer was afterwards on motion of Homberg stricken from the files and leave was refused her to file a motion to set aside said sale; and on hearing of the motion of Homberg the court confirmed the sale to Emil Homberg, finding that the property has been bid in at sheriff's sale by Louis Reemelin for the purpose of protecting said mortgage claim of \$2,700; that all his interests had been transferred to Emil Homberg; and ordered the sheriff to convey the property so sold to Emil Homberg, and subrogated said purchaser to the rights of all parties to said suit, and ordered the proceeds, \$1,000, distributed by paying the court costs, \$74.-68, and paying the balance, \$925.32, to Emil Homberg to be applied as a credit upon his mortgage claim which was then found to amount to \$5,454; and found that the mortgage of William M. Ramsey, guardian, had been extinguished by proceedings and sale and it was ordered canceled. Afterwards, Julia McGill Walters filed a motion to set aside said decree and for a new trial, which on hearing was overruled.

It is urged by the plaintiff in error that it was error for the court to confirm this sale after the lapse of so long a time after the filing of the petition in foreclosure; that the delay in seeking confirmation amounted to laches.

She stood in the attitude of mortgagor, admitting in her answer the making and entry of decree of foreclosure and sale, and the sale of the premises to Louis Reemelin, but sought to prevent confirmation of such sale in favor of the mortgagee, but not because of any question of validity of the mortgage. She did not deny that the mortgage was made to secure a *bona fide* loan which had never been repaid, and did not complain of any irregularities in the proceedings.

She raised a question whether Homberg had acquired the interests of Reemelin in the property. It could not be material to

her whether Reemelin or Homberg had become the owner under the purchase—that was a question between them. Nor was it material to her whether the money bid had been paid into the hands of the sheriff, or not. That concerned the sheriff when he made his return. And as the holder of the mortgage was the distributee of the fund, less only the court costs, it was not necessary to pay it in simply to have it paid back again (*Andrews v. Johns*, 59 O. S., 65). Her chief objection was that confirmation had been unusually delayed. She had no cause to complain of this delay, as she was herself a party and might at any time have taken steps to move the court to action.

Ramsey, guardian, after sale, finding no possible proceeds to pay his claim probably lost interest, and Reemelin no doubt felt that confirmation could be had whenever the opportunity to dispose of the property might arise. There were none others in interest to complain, as the defendants apparently had no reason to press the matter.

A decree of sale does not become dormant as does a judgment where execution is not issued. All judicial sales in this state require confirmation by the court before they can be completed. *Beaumont v. Herrick*, 24 O. S., 445, 446.

In *For v. Reeder*, 28 O. S., 181, it is held:

“The benefit of the rule relating to *lis pendens* may be lost by such long continued inaction as amounts to gross negligence in the party prosecuting, when such inaction is to the prejudice of innocent persons.”

But the court in its opinion, on page 185, uses the following language:

“In *Hunter v. The Earl of Hopetown*, 4 McQueen, 972, this is said: ‘A suit, though asleep, continues *in pendente* till disposed of, and the parties are still at issue, though the *lis* may have been for years comatose.’

“‘An action was commenced in 1845, and a defense lodged. In 1847, the proceedings ceased, and the action became dormant. Held (eighteen years afterward) that the *lis*, though still asleep, was nevertheless *in pendente*, and liable to be roused at the volition of either party.’ But in this case no rights of third parties had intervened to which the principle of *lis pendens* could apply. The remarks of the court applied to plaint-

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iff and defendant, who were the only parties interested, and, doubtless, as to them the *lis* may be pending so long as the rights of others are not affected thereby.''

The plea of laches attempted to be raised below by plaintiff in error, was not made on behalf of an innocent person, but was made by one who had failed to keep her obligation to repay the loan in an attempt to prevent its collection by the sale of the property which had been pledged to secure it, and therefore had no merit with the court. She said that the city of Cincinnati had acquired rights under appropriation proceedings, because of which the superior court had no jurisdiction to confirm said sale. She showed no authority to represent the city, and it made no claim on its own behalf, and there was no question as between the city and Homberg in the matter.

She said that the property had appreciated in value since the sale. That might be to her advantage if only this appreciation had been more than sufficient to pay off the liens. It appears that the sheriff's sale was for \$1,000 while the city later agreed to pay \$4,375 for it; but after deducting the taxes and assessments amounting to \$2,195.96 there was but \$2,179.04 for the net value, while the original loan of \$2,700 had not been paid in any part, and with interest added the court found then due upon it \$5,454; so there could be no possible interest in any balance for Julia McGill Walters, especially when the second mortgage to Ramsey found in 1895 to be \$606.66 would also have to be paid out of the proceeds before she would receive anything on distribution, if the sheriff on re-sale could have secured the amount the city had agreed to pay. And there was no attempt made to show that the value of the property was beyond that agreed upon between Homberg and the city in the appropriation proceedings.

Mrs. Walters, however, claimed that Homberg's mortgage had become unenforceable because of the fifteen years' statute of limitations. That could not be possible in a suit where the mortgage itself is being enforced. The bringing of the action prevented the running of the statute until that action is finally concluded.

It was claimed that the court committed error in striking Mrs. Walter's answer from the files. She had been in default from the time prior to July 6, 1897; it is a matter of discretion in the court whether default should be set aside and leave given to file an answer. *Clark v. Clark*, 20 O. S., 128.

The answer admitted the judgment and the decree for sale, and the sale to Reemelin. It undertook to set out reasons why the sale should not be confirmed to Homberg, but stated none why it should not be confirmed to Reemelin. All of the proper matters pleaded therein necessarily were considered by the court in determining the motion of Homberg to confirm the sale. Her answer was not stricken from the files until after the hearing of the evidence on that motion, and no evidence to sustain its allegations was offered by her. In our opinion it was error in the court below, having allowed the answer to be filed, to order it stricken from the files, and also to refuse counsel for Mrs. Walters leave to cross-examine witnesses. It was not error to refuse her leave to file a motion to set aside the sale, as that would only bring the same questions before the court as were necessary to be considered under the motion to confirm on which she was heard. And she was permitted to file a motion to set aside the decree of confirmation and for a new trial, and to be heard upon it, thus furnishing an opportunity to present all her objections to the court. The matters set up in her answer, if established, did not, however, furnish sufficient reasons why the sale should not be confirmed, and the errors above mentioned can not therefore be deemed prejudicial, especially when Mrs. Walters could have prevented the confirmation by a redemption of the property at any time before final confirmation, and she made no offer or attempt to redeem.

A careful examination of the record fails to disclose any error prejudicial to the plaintiff in error, and the judgment will therefore be affirmed.

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The second case below was an appropriation proceeding brought by the city, in which the same lot sold on foreclosure in the first case was taken by the city for park purposes, and the question arises, upon distribution, of the amount paid into

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court, as to the value of the property. This amount was fixed by the verdict of a jury under an agreement between Homberg and the city, and was paid into court under the provisions of Section 3686 of the General Code, and the fund took the place of the property to be contended for by the interpleading of the adverse claimants under the provisions of Section 3690, General Code. This amount was \$4,375, out of which was paid for taxes an assessment of \$2,195.96, leaving \$2,179.04 for distribution. This amount was claimed by Homberg by virtue of a mortgage under which he claimed not only a lien but also a right of ejectment. And it was also claimed by him as owner of the property under the foreclosure sale.

Plaintiff in error, on the other hand, contended that all claims under the mortgage are barred by the fifteen years statute of limitations, Section 11221, General Code, and because Homberg was not named as the original mortgagee, but held by assignment not witnessed and acknowledged, that he had no right of ejectment. Therefore while she admits the debt was never paid she claims that said foreclosure sale not having been confirmed until after the bringing of the appropriation proceedings, the superior court was without power to confirm said sale and the lien of the mortgage had become barred by the statute of limitations and there was no right of ejectment because of the form of the assignment.

It seems to have been conceded by counsel that if there had been no foreclosure proceedings and the mortgage alone was to have been depended on, it would have been too late to set up the mortgage in the appropriation proceedings and rely upon it, as more than fifteen years had transpired since the last payment on the note (*Kerr v. Lydecker*, 51 O. S., 240). And under the case of *Doyle v. West*, 60 O. S., 438, even if the finding in the superior court made at the time the decree of sale was taken could be alone relied upon, and subsequent proceedings were without effect, then the fifteen year statute would also apply to that.

This would probably be true, although the case last cited has been distinguished in the case of *Graham v. Simon*, 76 O. S., 77, where it is held that an action upon a judgment of a court in

this state may be brought at any time within twenty-one years (Section 11648, General Code), following the case of *Tyler, Exr., v. Winslow*, 15 O. S., 364.

But counsel for defendant in error insist that Homberg became vested with a title under the mortgage to Frankenberger, not because Frankenberger was a mere trustee for him and that the mortgage should have been declared to be his property from the first, but by reason of its assignment to him, and because by the amendment of the section now found in the General Code as Section 8546, that the assignment of a mortgage in order to vest the title does not now require witnesses and acknowledgment but carries all of the mortgagee's interest in the property and land including the legal title and the right of ejectment, if such assignment conforms to the terms of that section; and having legal title that he would therefore be entitled to bring ejectment for possession of the property within the twenty-one year statute of limitations under the case of *Bradford v. Hale*, 67 O. S., 316.

The court below held with the defendant in error in this contention.

We do not believe that the amendment found in Section 8546 of the General Code dispensing with witnesses and acknowledgment, can be construed to go to the extent of holding that an assignment under its terms will carry the legal title to the land covered by a mortgage. The positive terms of Section 8510 require that the conveyance of an interest in real property must be acknowledged in the presence of two witnesses. A conveyance to vest a title in a mortgagee sufficient to sustain an action for ejectment must be executed in accordance with the requirements of this section.

The court below also found that the bringing of the appropriation proceedings by the city under the powers of eminent domain had some over-riding power which stopped further action on the part of the superior court in the foreclosure case, and therefore did not rely upon the sale and its confirmation but rather upon the right of ejectment in determining that Homberg was entitled to receive the money held for distribution 14 N.P.(N.S.), 599; 15 N.P.(N.S.), 541.

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We find nothing in the statutes controlling appropriation proceedings that would give the court in which they are instituted jurisdiction over property to be condemned, to the exclusion of the jurisdiction of another court in which foreclosure proceedings, involving the same property, had been previously commenced and sale made but not confirmed. The court where jurisdiction first attached could proceed to final judgment confirming such sale, and such confirmation would relate back to the day of sale and pass title as of that day. *Jashensky v. Velrath*, 59 O. S., 540, 545; *Boyd v. Longworth*, 11 Ohio, 236; *Oviatt v. Brown*, 14 Ohio, 286.

The fact that the sale had not been actually confirmed in the superior court when Homberg was first made a party in the appropriation proceedings does not change the rights of the parties. The city dealt with him as the real party in interest both in fixing the value of the property and in the litigation to determine the amount of the assessment charges collectible, and made no denial as to his right to the fund. The supplemental pleadings filed by him setting up his title acquired under the foreclosure sale, take the place of his original answer. The judgment in the foreclosure proceedings, and Homberg's title thereunder, can not be collaterally questioned here by Mrs. Walters. *Sheldon v. Newton*, 3 O. S., 494; *Hammond v. Davenport*, 16 O. S., 177, 181-183; *Railroad Co. v. Village of Belle Center*, 48 O. S., 273; 24 Cyc., 73.

Homberg, as the owner of the property under the foreclosure sale, is entitled to its proceeds in the appropriation proceedings, and therefore we find that there is no error in the judgment of the court of common pleas in awarding the fund to the defendant in error, although the reasons given for making such award do not meet with our approval.

The judgment of the court below is affirmed.

**PROPER TEST AS TO THE SUFFICIENCY OF A LOCAL  
OPTION PETITION**

Circuit Court of Cuyahoga County.

**IN RE PETITION IN FAVOR OF PREVENTING THE SALE OF  
INTOXICATING LIQUORS IN A RESIDENCE DISTRICT.**

Decided, February 13, 1912.

*Residence District Local Option—Sufficiency of Petition—What Election is Standard for Counting Names.*

The sufficiency of a petition in favor of prohibiting the sale of intoxicating liquors, filed under favor of Section 6140, General Code, is to be judged by the vote cast at the last regular municipal election held before the petition was filed.

*Geo. W. Shaw*, for plaintiff.

*C. M. Earhart*, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

The question presented by the record in this case is whether the sufficiency of a petition in favor of prohibiting the sale of intoxicating liquors, filed under favor of Section 6140 of the General Code, is to be judged by the vote cast at the last regular municipal election held before the petition was filed, or at the last regular municipal election before the hearing on the petition.

It appears from the record herein that the petition in question was filed the day before the November election of 1911, and contains the signatures of qualified electors not less in number than a majority of the vote cast in November, 1909, which was the last regular municipal election held before the petition was filed, but less than a majority of the vote cast in November, 1911, which was the last regular municipal election held before the hearing on the sufficiency of the petition.

Section 6152 of the General Code undertakes to lay down the rule on this subject, but it is not specific. It reads as follows:

“Such mayor or judge shall decide whether the petitioners are qualified electors in the residence district and equal in

number a majority of the votes cast in such residence district at the last regular municipal election," etc.

It would have been so easy to have said, "at the last regular municipal election held before the petition was filed," or "before the hearing on the petition is had," that one naturally wonders that the Legislature did not specify which election should be looked to as the standard.

This looseness of expression, however, is further exemplified by the expression "*equal in number a majority*" instead of "*are not less in number than a majority*" and "*regular municipal election*," which latter phrase has been held to be indefinite and include either a *general* or *special* election. The same uncertainty of expressions runs to such an extent through all the sections of the code regulating residence district local option, that no clear light is thrown upon the meaning of Section 6152 here under consideration, by any other section of the law.

We are remitted, therefore, to a general consideration of the purpose and intent of the law as a whole.

There can be no doubt that a history of the legislation of this state on the liquor question shows an intention of the Legislature, in recent years, at least, to permit the people themselves to determine whether they will permit or prohibit the sale of liquor in this midst. The will of the people is ordinarily expressed at an election, and so we had at first, and still have, laws providing for the submission of these questions to the people at an election. Then this method of registering their will by petitions was adopted. Can it be considered anything else than an open instead of a secret ballot? We think not. Only qualified electors of the district are authorized to sign such petition, and it takes a majority of them to make a petition sufficient.

At an election the qualifications of voters are determined when they offer their ballots, and the votes are canvassed after the polls are closed, by the election officers.

In the case of these petitions, the qualifications of the signers are determined by the judge or mayor, and he also canvasses

the vote, tallying all proper signatures to the petition in its favor and all other qualified electors in the district against it.

The analogy to an election is so complete that, without further reference to other sections throwing a side light upon this analogy, we hold that the *filing* of the petition is in effect, the casting of votes, and the number voting in favor of the question submitted by the petition, as shown by the proper signatures thereto, and the number voting against said question, as shown by subtracting the number of such signatures from the whole number of qualified voters in the district, measured by the standard of the vote at the last municipal election held before the day of filing the petition, determines the question thus submitted to the people.

If this theory is sound, the sufficiency of the petition depends upon the circumstances existing at the time it is filed, and can not be affected by events thereafter occurring.

It follows that the election held in November, 1911, in nowise affected the sufficiency of the petition filed the day before said election.

So holding, the judgment is affirmed.

### TRIAL FOR ASSAULT TO KILL AND MAIM.

Circuit Court for Lucas County.

W. D. CROMLEY V. STATE OF OHIO

Decided, November 16, 1912.

*Criminal Law—Defendant Charged With Assault to Kill, to Wound and Mayhem—Charge to the Jury—Omission of the Word "Not"—Verdict Should Respond to the Counts Under Which Defendant is Tried—Reasonable Doubt.*

1. It is reversible error to state a proposition of law incorrectly in the charge to the jury by leaving out one material element, notwithstanding the same proposition was correctly stated in an earlier part of the charge.
2. It is also error to so charge the jury as to authorize them to return a verdict of guilty "under the third count of the indict-

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ment if they should find simply that the defendant made the assault with a dangerous instrument," when the third count of the indictment contained no charge of assault made with a dangerous instrument.

3. To charge a jury that "if you can say that you have an abiding conviction of defendant's guilt, then you are satisfied beyond a reasonable doubt," is error for the reason that the statement does not contain all the requirements as to the degree of evidence necessary to satisfy the mind beyond a reasonable doubt.

*C. W. Meck, Byron F. Ritchie and Ralph Emery, for plaintiff in error.*

*H. C. Webster, Prosecuting Attorney, and A. F. Connolly, for state.*

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to Court of Common Pleas of Lucas County.

The plaintiff in error was indicted at the September term, 1911, the indictment containing three counts. The first count charged him with an assault with intent to kill one Rezin Orr; the second count with intent to wound said Rezin Orr, and the third count contained a charge of mayhem committed on said Rezin Orr.

The prosecuting attorney on the trial in the court of common pleas elected to proceed upon the first and third counts and the jury returned a verdict of guilty on the third count contained in the indictment. Upon that verdict the defendant was sentenced to the penitentiary.

Numerous errors are assigned in this court for which it is contended the judgment of the court below should be reversed. Among other errors insisted upon by counsel are those relating to the charge of the court as given to the jury. During the course of the charge the trial judge properly stated to the jury the essential elements constituting the crime of mayhem as charged in the third count in the indictment, and among others, that before the jury returned a verdict of guilty under that count, they must find from the evidence, beyond a reasonable doubt, that the left eye of the complaining witness, Rezin Orr, was destroyed or put out as a result of the claimed assault. Elsewhere

in the charge the trial judge again recurs to the elements necessary to constitute this crime and undertakes to re-state them, and in this re-statement he omits the requirement that the burden rests upon the state in order to justify a conviction under the third count to satisfy the jury beyond a reasonable doubt that an eye of said Rezin Orr was destroyed or put out. The court in the concluding portion of this re-statement says to the jury, "Unless you find, and before you can find a verdict against the defendant on this count in the indictment, you must find these facts established to your satisfaction beyond a reasonable doubt by the evidence." By so stating, the trial judge thus emphasized the essential facts as just recited by him, which recital omitted the fact already stated. In view of this state of the charge, the jury may have concluded that it was unnecessary, in order to justify a conviction under the third count in the indictment, that they should find that an eye of the complaining witness had been destroyed or put out.

The indictment is returned under Section 12416, General Code, which requires that before the defendant can justly be convicted of the particular offense set forth in the third count of the indictment, the eye must be put out or destroyed. The evidence in the case was of such character that it became important for the jury to determine, as one of the essential elements of the crime, the averment contained in the indictment which was omitted in the re-statement made by the trial judge.

I call attention to two cases which shed light upon the question under consideration: *Northern Ohio Ry. Co. v. Rigby*, 69 O. S., 184, 191; *Railway Co. v. Frye*, 80 O. S., 289, 298.

In each of these cases the correct proposition of law had been given to the jury in charge, but elsewhere in the charge the law was improperly stated. Under that state of the case the Supreme Court say on page 298 of the case last cited that it is impossible for the court to determine which of the instructions the jury followed, and that the court can not assume that the jury selected the one statement which was substantially correct and rejected the other statements which were erroneous, and that under

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such circumstances the rule that error without prejudice is not ground for reversal can have no application.

We conclude that the charge is erroneous in thus re-stating the elements and leaving out one material element as contained in this charge.

The court further charging the jury gives this proposition:

"Before they can find the defendant guilty under the third count of this indictment, they must be satisfied beyond a reasonable doubt from the evidence that the defendant, if he did make this assault, made it with the malicious intent to maim or disfigure the said Rezin Orr, or that he made it with a dangerous instrument,—that he did make the assault with a dangerous instrument."

The language is subject to the infirmity of the earlier part of the charge to which reference has been made, and also to the further objection that it apparently authorized the jury to return a verdict of guilty under the third count of the indictment if they should find simply that defendant made the assault with a dangerous instrument, whereas the third count of the indictment contains no charge of an assault made with a dangerous instrument, and we therefore hold that this proposition of law in view of the language in the indictment is erroneous.

The court in defining reasonable doubt uses some language, doubtless inadvertently, to which we think it important that attention should be called. He said to the jury "This doubt should not be speculative or imaginative nor be based on conjecture or fancies; it arises, or may arise from that state of the proof which, after you have considered and compared all the evidence, and having in mind the presumption of defendant's innocence, leaves your minds in that condition that you *can say* that you have an abiding conviction to a moral certainty of defendant's guilt." By omitting the word "not" after the word "can" and in front of the word "say," the court states to the jury the opposite of the proposition which he doubtless intended to give in the charge. The charge should have stated in substance that under the circumstances stated the doubt would arise if the minds of the jury were left in such condition that

they could not say they had an abiding conviction to a moral certainty of defendant's guilt. The language used by the court is, with the correction suggested, substantially the same as was used in the charge as found in *Commonwealth v. Webster*, 5 Cush., 295, 320, cited with approval in *Morgan v. State*, 48 O. St., 371, and particularly page 378. See also *Clark v. State*, 12th Ohio, 483, and particularly page 496.

The trial judge stated to the jury further as follows: "If you can say that you have an abiding conviction of defendant's guilt, then you are satisfied beyond a reasonable doubt." This statement contained in two lines in effect justifies a verdict of guilty so far as the degree of evidence is concerned if the jury have an abiding conviction of the defendant's guilt. We think the language is not sufficiently clear and does not contain all the requirements relating to the degree of evidence that are necessary in defining a reasonable doubt.

The verdict returned by the jury in this case specifically finds the defendant guilty as charged in the third count of the indictment, without making any reference to the first count. The case was submitted to the jury upon both the first and third counts and proper practice would require that the verdict should respond to the issues made on both the first and third counts of the indictment. *Wilson v. State*, 20 Ohio, 26; *Jackson v. State*, 39 O. S., 37.

We have examined the evidence contained in the bill but as the case will have to be reversed and remanded for a new trial, we refrain from passing upon the weight of the evidence.

Judgment reversed and cause remanded for a new trial.

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**ASSUMPTION OF RISK UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.**

Court of Appeals for Preble County.

**THE DAYTON & UNION RAILWAY COMPANY v. EDWARD C. BUNGER.\***

Decided, June 1, 1914.

*Railways—Injury to Engineer Employed in Interstate Commerce—From a Defect of Which He Had Knowledge—Charge of Court as to Assumption of Risk.*

The common law doctrine of assumption of risk remains in force under the federal employers' liability act, except as provided in Section 4 of said act.

Error to the Court of Common Pleas of Preble County.

*M. R. Waite, Nevin & Kalbfus and Fisher & Crisler*, for plaintiff in error, cited and commented on the following cases:

*Bowers v. Ry. Co.*, 10 Ga. App., 367; *Hall v. R. R. Co.*, 169 Ill. App., 12, 17-19; *Barker v. Kansas City, etc. Ry. Co.*, 129 Pac. Rep., 1151; *Freeman v. Powell*, 144 S. W., 1033; *Neal v. Idaho R. R. Co.*, 125 Pac. Rep., 331; *Seaboard Air Line Ry. v. James T. Horton*, decided April 27th, 1914, U. S. Supreme Court.

*Matthews & Matthews and Reisinger & Reisinger*, for defendant in error, cited:

*Philadelphia & Atlantic Ry. Co. v. Tucher*, 35 App. Cases, Dist. of Columbia, p. 123; *Wright v. Y. & M. Valley Ry. Co.*, 197 Fed., 94; *Deatley v. C. & O. Ry. Co.*, 201 Fed., 591; *Northern Pacific Ry. Co. v. Mearkel*, 198 Fed., p. 1; *Doherty on Liability of Railroads to Interstate Employees*.

This is a suit for damages on account of personal injuries. The defendant in error was an engineer in the employ of the plaintiff in error company and had been in the employ of said company for about six years; three years of said time as fireman

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\*Reversing *Bunger v. D. & U. Railway Co.*, 14 N.P.(N. S.), 487.

and about three years as engineer. He received the injuries complained of while he was acting in his capacity as engineer for the plaintiff in error company hauling a freight train and being at the time engaged in interstate commerce.

Plaintiff in error in its answer (as defendant in the court below), set up as a third defense the fact that the defendant in error (plaintiff below) well knew of the defects of which he complained and that he had known of them for a long time prior to the accident, and that he, therefore, in doing as he did, with knowledge of such defect, assumed all the risks arising from the acts of the defendant of which he complained. The defendant in error demurred in the court below to this third defense, and the common pleas court sustained said demurrer on the ground that under the federal employers' liability act of April 22, 1908 (35 U. S. Stat. at Large, 65, Chap. 149; Supplement to Compiled Statutes, 1911, page 1322), the defense of the assumption of risk had been entirely abolished and could no longer be pleaded. It was admitted that the said federal employers' liability act controlled this case, and also, that there was no violation of the federal safety appliance act.

Upon trial a verdict was rendered in favor of the defendant in error, motion for a new trial argued and overruled, and the case taken on error to the court of appeals.

At the close of the evidence, and before argument, plaintiff in error submitted a number of special charges to the common pleas court, some of which were refused; among others refused were the following:

Special Charge No. 14: "I charge you as the law that the plaintiff can not recover from the defendant on account of his injuries if you find from the evidence that the defects of which he complains were known to the plaintiff, no matter how negligent the defendant may have been. Under these circumstances the plaintiff assumes the risk and if injured can not recover."

Special Charge No. 18: "I charge you that an employee assumes the risk of the ordinary dangers of his occupation and also those risks which are known to him or are so clearly observable that he may be presumed to know them. And so if you find from all the evidence in this case that the plaintiff was

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was injured while in the discharge of a duty involving the ordinary dangers of his occupation, or if in the discharge of that duty he voluntarily placed himself in a position of danger which was known to him or which was clearly observable by him, or in the exercise of ordinary care should have been clearly observable by him, he assumes the risk of his act and can not recover damages from the defendant."

FERNEDING, J.; ALLREAD, J., and KUNKLE, J., concur.

This action was brought under the federal employers' liability act of 1908. The federal safety appliance act contemplated by Section 4 of the federal employers' liability act had not become effective at the time of the injury complained of. The trial court adopted the view that the common law defense of assumption of risk was abolished by Section 1 of the federal employers' liability act. Accordingly, the demurrer was sustained to the third defense embodying such defense, and such defense was not allowed to be considered in favor of the railway company during the conduct of the trial.

If we were called upon originally to construe Section 1 of the federal employers' liability act we would strongly be inclined to hold the same view; but since the case has come into this court the Supreme Court of the United States, which is the highest authority upon the federal question involved here, has authoritatively decided that the common law doctrine of assumption of risk remains in force except as provided in Section 4 of the federal employers' liability act. Upon the authority therefore of *The Seaboard Air Line Railway Company v. James T. Horton*, decided April 27th, 1914, by the Supreme Court of the United States, we hold that the trial court erred in sustaining said demurrer to the third defense.

We are also of the opinion that the trial court erred in its refusal to give charges Nos. 14 and 18, requested to be given to the jury before argument by the defendant, to which refusal proper exceptions were noted.

The judgment of the common pleas court is, therefore, reversed and the cause is remanded to that court with instructions to overrule the demurrer to the third defense of the answer, and for further proceedings.

**SALE IN FORECLOSURE UNDER JUDGMENT FOR AN  
EXCESSIVE AMOUNT.**

Circuit Court of Cuyahoga County.

**ANNA V. KUZEL ET AL. V. THE CITIZENS SAVINGS &  
TRUST COMPANY ET AL.**

Decided, February 13, 1912.

*Foreclosure of Mortgage—Amount Found Due Excessive, But Foreclosure Sale Realizes Only Enough to Satisfy Amount Confessedly Due—Security for Joint Indebtedness, but Personal Liability Individual.*

1. Though a decree in foreclosure may be for more than was lawfully due the plaintiff, if the sale thereunder produces only enough to satisfy the amount confessedly due on the mortgage, the sale will not be set aside, for in such case, under Section 11702, General Code, the judgment creditor is required to make restitution only of the amount for which the mortgaged lands were sold, with interest, and that amount, at least, is confessedly due the mortgagor.
2. Husband and wife being jointly indebted to a bank in the sum of \$2,100 and the husband individually indebted to it in the sum of \$10,314.52, the bank demanded of the husband that he give security for the liabilities of himself and wife suggesting "that if he could not pay, he and his wife give a mortgage" on certain premises owned by them, whereupon they jointly executed a new note for \$10,000 and a mortgage securing the same and delivered them to the bank, the amount of the new note being fixed at the estimated value of their equity in the property, there being a prior mortgage on it; *Held:* The mortgage secures the joint indebtedness of husband and wife and individual indebtedness of the husband, but the wife did not, by the transaction, increase her personal liability to the bank.

*A. A. & A. H. Bemis, for plaintiffs in error.*

*W. J. O'Neil, contra.*

*NIMAN, J.; WINCH, J., and MARVIN, J., concur.*

This proceeding in error is brought to reverse the judgment of the court of common pleas rendered in an action in that court in which the defendant in error, the Citizens Savings & Trust

Company, was plaintiff, and the plaintiffs in error, Anna V. Kuzel and Joseph H. Kuzel, and the defendant in error, Harriet M. Ellsworth, were defendants. Unless otherwise indicated, the parties will be referred to in the relation which they stood in the original action.

The action below was one for the foreclosure of a mortgage. The defendant, Harriet M. Ellsworth was a lienholder, whose rights are not attacked and against whom no relief is sought in this proceeding.

The findings of fact and conclusions of law made by the court of common pleas are before us, and by reference to these it appears that on the 14th day of September, 1907, the defendants, Anna V. Kuzel and Joseph H. Kuzel, were legally indebted to the Dime Savings & Banking Company for two joint and several overdue promissory notes, one for \$1,600, with certain interest thereon, and the other for \$500, with certain interest thereon, both payable to the order of the Dime Savings & Banking Company; that the consideration for said notes was money loaned to said defendants in the same amounts as the face of said notes; that at the same time, the defendant, Joseph H. Kuzel, was also indebted to said the Dime Savings & Banking Company, either primarily or secondarily, upon numerous items of indebtedness aggregating \$10,314.52; that on and prior to said 14th day of September, 1907, said the Dime Savings & Banking Company was engaged in the banking business in the city of Cleveland, and was at that time in danger of being thrown into liquidation by reason of outstanding obligations which it was unable to pay, and that several officers of said company, including the defendant, Joseph H. Kuzel, were heavily indebted to said company; that at that time said defendant, Joseph H. Kuzel, was the assistant treasurer of said company; that on and shortly prior to said 14th day of September, 1907, the duly authorized officers of said company demanded of said defendant, Joseph H. Kuzel, that the obligations of himself and said defendant, Anna V. Kuzel, be paid, or security furnished therefor; that the suggestion was made to him that if he could not pay, he and the said defendant, Anna V. Kuzel, give a mort-

gage on certain premises at that time owned by said defendant, Anna V. Kuzel; that he was informed that unless he should at once pay or furnish security for said obligations and certain other obligations asserted to exist, but disputed by him, he would be discharged from his employment as assistant treasurer of said company for his alleged misconduct and breaches of duty as said officer, but that if he paid such obligations, or furnished satisfactory security therefor, he would be retained in his position, which would give him time to make collections of certain debts outstanding for which he was security, with others, to the bank; that on said 14th day of September, 1907, he, with his wife, acting through his procurement, executed the note and mortgage described in the plaintiff's petition, and delivered the same to said the Dime Savings & Banking Company to secure the payment of all obligations then or thereafter legally owing from said defendants, Anna V. Kuzel and Joseph H. Kuzel, or either of them, to said company; that the amount of the note given was \$10,000, payable one year after date, with interest at six per cent. per annum, payable semi-annually on the 15th day of June and December of each year until paid, all overdue interest to draw interest at the rate of eight per cent. per annum, payable semi-annually until paid; that the amount of said note was fixed at the estimated value of the equity of said defendants, Anna V. Kuzel and Joseph H. Kuzel, in the property covered by the mortgage given; that after the execution of said note and mortgage, they were duly assigned to the plaintiff, the Citizens Savings & Trust Company; that subsequent to the execution and delivery of the \$10,000 note and mortgage, said the Dime Savings & Banking Company demanded of said defendant, Joseph H. Kuzel, that he give a demand note for the sum of \$11,800 to cover the same indebtedness represented by the \$10,000 note and mortgage except the \$500 note and the \$1,600 note, on which both he and the defendant, Anna V. Kuzel, were liable, and certain additional items of indebtedness; that in compliance with this demand, he, on the 15th of December, 1907, executed such a note; that about the same time he also executed a demand note to the

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bank for \$2,000 with interest, which was accepted by it to evidence the same indebtedness represented by the \$1,600 note of the said Anna V. Kuzel and Joseph H. Kuzel, before referred to, including the unpaid interest thereon, and that thereupon said the Dime Savings & Banking Co., caused a credit of \$1,600 and interest to be placed on the ledger card of the \$1,600 note; that the \$1,600 note has at all times been retained and held by the company and its assigns; that there was attached as collateral to said \$1,600 notes a life insurance policy payable to the estate of Joseph H. Kuzel, for \$2,000 and a certificate for 100 shares of the common capital stock of the Lake Shore Electric Railway Company; that after the credit was made on the ledger card of the \$1,600 note, the certificate of stock was transferred as collateral to said \$2,000 note, and the life insurance policy was thereafter carried with said \$11,800 note; that the \$2,000 note has not been paid, and that all money paid on said debt and previous credits thereon, have been credits on said \$1,600 note; that neither the Dime Savings & Banking Company nor any of its directors, officers or agents, ever made any false representations, threats or intimations to the defendant, Anna V. Kuzel, nor did the Dime Savings & Banking Company, nor any of its directors, officers or agents, other than the defendant, Joseph H. Kuzel, make any representations to the said Anna V. Kuzel about said note and mortgage, and that she had full and free opportunity at the time she executed the same, to read and examine said note and mortgage; that the said defendant, Anna V. Kuzel, was not informed as to the various matters set forth in the finding of fact concerning the condition of the bank by anyone representing the bank, and that she had no knowledge thereof other than as may have been communicated to her by her said husband, Joseph H. Kuzel.

As conclusions of law, from the facts found, the court of common pleas found that there was due the plaintiff, the Citizens Savings & Trust Company, from the defendants, Anna V. Kuzel and Joseph H. Kuzel, jointly and severally on their two notes for \$500 and \$1,600, the sum of \$2,850.62, with interest from September 1, 1911; that there was due the plaintiff from

the defendant, Joseph H. Kuzel, including said sum of \$2,850.62 and interest, the sum of \$10,314.52, with interest from the first day of the September term of court, 1911; that said note and mortgage for \$10,000 given by the said Anna V. Kuzel and Joseph H. Kuzel secured all the indebtedness found to be owing the plaintiff by said parties, and that "there is now due plaintiff on said \$10,000 note and mortgage from defendants, Anna V. Kuzel and Joseph H. Kuzel, the sum of \$10,314.52 and interest thereon from the first day of this term of court"; and that to secure the payment of said sum said plaintiff had and holds the best lien on the property in the decree described, subject only to the lien of the defendant Harriet M. Elsworth.

Before this case was heard in this court, the property involved in the foreclosure proceeding was sold at sheriff's sale under the decree of foreclosure, to the plaintiff, and after payment of the costs and prior liens out of the proceeds of the sale, there was paid to the plaintiff the balance remaining, which amounted to only \$692.29.

It is contended by the plaintiff in error, Anna V. Kuzel, that there was a failure of consideration for the giving of the mortgage on her property, except as to the indebtedness to the bank for which she was jointly liable with her husband, the defendant, Joseph H. Kuzel; that since such indebtedness was represented by only the \$500 note and the \$1,600 note referred to, the mortgage when given secured only the amounts due on those two notes, and did not, by reason of want of consideration, secure any of her husband's individual indebtedness; that after the giving of said mortgage, the transaction that took place concerning the \$1,600 note, as above detailed, constituted a payment and discharge thereof, leaving the \$500 note with interest thereon, the only indebtedness secured by said mortgage, at the time of the trial in the court of common pleas.

A reversal is sought of all findings in the court below, not in accord with these contentions.

The amount due on the \$500 note, conceded to have been secured by the mortgage, was in excess of the amount received by the plaintiff in error, on the distribution of the proceeds of

the sheriff's sale, and the plaintiff in error insists that there is, therefore, no prejudicial error in the decree of the court below, so far as the mortgaged property and the application of the proceeds thereupon, are concerned. This proposition, limited to the effect of any error committed by the trial court, upon the title to the property sold, and the distribution of the proceeds, is well founded.

Section 11702, General Code, provides:

"If a judgment, in satisfaction of which lands or tenements are sold, be thereafter reversed, such reversal shall not defeat the title of the purchaser. In such case restitution must be made by the judgment creditor, of the money for which such lands or tenements were sold, with lawful interest from the day of sale."

It is clear, therefore, that reversal of the judgment of the court of common pleas could not defeat the title of the purchaser of the mortgaged premises, and it is equally clear that the plaintiff could not be required to make restitution of so much of the proceeds of the sale as it has received, since it did not receive as much as was admittedly secured by the mortgage.

In another way, however, the plaintiff in error may be prejudiced if the findings of law and the judgment of the court below were not correct. The finding of the court of the amounts due from the defendant, Anna V. Kuzel, on the various notes, as set forth in the decree, although no personal judgment therefor was rendered against her, is a judicial determination of the validity of the indebtedness, and execution may issue for the deficiency left after crediting the amount received from the sale of the premises. *Giddings v. Barney*, 31 O. S., 80.

Of the errors complained of, therefore, only those need be considered that relate to the several amounts found due the plaintiff from the defendant, Anna V. Kuzel, since it is only in respect to these that she can be prejudiced by any error found in the findings and decree of the court below.

The validity of the \$500 note being admitted, no further attention need be given it.

As to the \$1,600 note on which the defendant, Anna V. Kuzel, was jointly liable with her husband, it is claimed that by taking the note of December 15, 1907, for \$2,000 signed by Joseph H. Kuzel alone, to evidence the same debt, represented by the one for \$1,600 and interest thereon, crediting the ledger card of the latter note with the amount of the former, and shifting the collateral from the earlier to the later notes, the bank released the defendant, Anna V. Kuzel.

In our opinion the facts do not justify this conclusion. The taking of a note for a debt does not constitute payment of the debt unless such is the agreement, and the facts disclose no such agreement. The amount realized from the collateral and the interest paid on the \$2,000 note have been credited on the one for \$1,600 which was never surrendered. The entering of credits on the ledger card of the \$1,600 note was according to the usage of the bank and was a mere matter of bookkeeping, and did not indicate that the note had been paid. Nothing in the facts found would justify the conclusion of law that this note had been paid, or that Mrs. Kuzel had been released therefrom. The finding, therefore, that there was due the plaintiff from Anna V. Kuzel and Joseph H. Kuzel jointly and severally, on the notes for \$500 and \$1,600 the sum of \$2,850.62, with interest from September 1, 1911, is sustained.

The only remaining question relates to the correctness of the finding that there was due from the defendants, Anna V. Kuzel and Joseph H. Kuzel, on the \$10,000 note and mortgage the sum of \$10,314.52 and interest.

The liability of Joseph H. Kuzel in this amount can not be disputed on the facts found. As to Anna V. Kuzel \$2,850.62 of this amount, with interest, has been heretofore considered, and the finding of an indebtedness on her part to this extent approved.

If the Dime Savings & Banking Company stood in the position of a holder for value of said \$10,000 note, or if the facts found show a consideration for said note to the full extent, the finding, that the full amount thereof, with interest, was due the plaintiff from these defendants should stand, but if not, as against

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Anna V. Kuzel, the finding was erroneous, and the amount excessive by the difference between \$10,314.52 and \$2,850.62.

We are of opinion that the mere continuance of Mr. Kuzel in his employment, and the fact that the bank did not bring suit on the paper in its possession, and the other facts relied upon, did not furnish a new consideration for the note and mortgage. If there were nothing in the facts showing any limitation upon the liability assumed by Mrs. Kuzel when she joined in the execution of the note and mortgage, it might well be contended that she was liable to the full amount under the principle of *Pitts v. Foglesong*, 37 O. S., 676, where it was held:

“One, not induced by fraud, who indorses a negotiable promissory note owned by another, for his accommodation without restriction as to its use, is liable to an indorsee who receives it in good faith from the owner, before due, as collateral security for an antecedent debt of such owner, although there be no other consideration for giving such collateral.”

We find, however, by reference to the finding of facts, that when the bank made its demands upon Mr. Kuzel for security for the liabilities of himself and Mrs. Kuzel, the suggestion was made to him, quoting from the finding, “that if he could not pay, he and Anna V. Kuzel give a mortgage on the premises in this decree described for such purpose.” Again the facts inform us that the amount of the note given was fixed at the estimated value of the equity of said Joseph H. Kuzel and Anna V. Kuzel in the property in the mortgage described.

The logical and reasonable inference from these facts is that it was the intention of the parties on both sides of the transaction, that Mrs. Kuzel should convey her property by way of mortgage, to secure both her own indebtedness and that of her husband, but that she should not incur any personal obligation beyond that already owing by her. The giving of the note for \$10,000 was a mere incident in the furnishing of the mortgage security which the bank had demanded, to secure the debts of the Kuzels, already existing, and such as might thereafter be created.

The mortgage security has been exhausted, and for the reasons suggested, neither of the plaintiffs in error has been prejudiced in any way by what took place in the court below with respect thereto, but the plaintiff in error Anna V. Kuzel is entitled to a reversal of so much of the judgment or decree as finds to be due from her to the defendant in error, the Citizens Savings & Trust Company, any amount in excess of \$2,850.62, with interest from the first day of September, 1911.

The judgment of the court of common pleas is therefore reversed, but the facts being before us, and the error found consisting of a finding of law, not warranted by the facts, the judgment will be rendered by this court which should have been rendered by the court below.

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**PRESUMPTION AS TO KNOWLEDGE OF DIRECTORS OF A CORPORATION.**

Circuit Court of Cuyahoga County.

**THE P. C. O'BRIEN COMPANY V. THE WESTERN SEAMEN'S FRIEND SOCIETY.**

Decided, February 13, 1912.

*Corporations—Officers Presumed to Know What—Ratification of Unauthorized Acts of Agents—Implied Powers of Corporations—Ultra Vires.*

1. For the purpose of protecting the rights of innocent third persons, the knowledge of the directors of a corporation of those things which, in the exercise of their official duties, they ought to know, will be presumed.
2. A corporation may ratify the unauthorized acts of its agents, and no formal resolution of the board of directors is necessary for that purpose, and if the unauthorized act of an agent of a corporation is clearly beneficial to the corporation, a presumption of ratification will arise from slight circumstances.
3. The Western Seamen's Friend Society, incorporated under special act in 1850, whose purpose is the disseminating of moral and religious instruction and other charities amongst sailors and boat-

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men doing business on our western waters, and having power in furtherance of this purpose "to acquire, possess and enjoy, sell, convey and dispose of property, real and personal or mixed, whether acquired by purchase gift, devise or legacy, also of all property of which the society is now the legal and rightful owner; provided the annual income thereof shall not exceed the sum of forty thousand dollars, having purchased hotel property particularly adapted to the accommodation of sailors, and operated it as such, purchasing groceries therefor, from which operation it received a profit, is liable for the groceries so purchased.

*M. P. Mooney*, for plaintiff in error.

*J. M. Shallenberger*, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The parties to this proceeding in error stand in the same relation as in the court of common pleas. Upon the trial of the case, after all the evidence was in on both sides, the court, upon motion of the defendant, directed the jury to return a verdict for the defendant. For alleged error of the trial court in thus directing a verdict, the plaintiff in error seeks a reversal of the judgment against it.

The plaintiff's action in the court of common pleas was brought to recover the sum of \$359.87 for groceries claimed to have been furnished the defendant, in its operation of the Kimball Hotel, formerly the Hotel Bethel, in the city of Cleveland.

While the delivery to the hotel of the groceries is not denied, it is claimed that the board of directors never authorized the operation of a hotel and the purchasing of the groceries.

The defendant in error purchased the land and building at the corner of Spring street and Superior avenue in the city of Cleveland on March 15, 1905, from the Cleveland Bethel Union. At that time the property was used by the Cleveland Bethel Union as a hotel, known at the Hotel Bethel, which was managed by one Fitzpatrick, on behalf of the owner. On March 15, 1905, at the time of the purchase of the property, Fitzpatrick was instructed by a Mr. McMahon, the general superintendent of the defendant in error, and a member of the board of directors, to continue in the management of the hotel as he had been

doing. The hotel was managed by Fitzpatrick from that date to some time in September, 1908. During that period of time he received a salary, and the surplus earnings of the hotel were turned over by him monthly to the secretary and treasurer of the Western Seamen's Friend Society, and were by that official deposited to the bank account of the society, and used by it for its purposes. The groceries, for the price of which the plaintiff sued, were furnished to the hotel thus under Fitzpatrick's management, between the first of August and the first of September, 1908. Previous to this and during the entire period from March 15, 1905, to August 1st, 1908, the plaintiff in error had furnished groceries to the hotel, which had been paid for by Fitzpatrick out of funds realized from the operation of the hotel. These payments had been accounted for by Fitzpatrick to the secretary and treasurer of the Western Seamen's Friend Society, in statements rendered from time to time.

On this state of facts, and by reason of other facts not herein enumerated, there was evidence of authority, or of ratification, to be submitted to the jury, if the defendant in error could under any circumstances be held liable for a claim of the kind sued for, and incurred for the purpose, and in the manner, indicated.

It is a principle of law that for the purpose of protecting the rights of innocent third persons, the knowledge of the directors of a corporation of those things which, in the exercise of their official duties, they ought to know, will be presumed (*Arlington v. Price*, 122 Mass., 270; *Murray v. Nelson Lumber Co.*, 143 Mass., 250). The law is clearly settled that a corporation may ratify the unauthorized acts of its agents, and no formal resolution of the board of directors is necessary for that purpose, and if the unauthorized act of an agent of a corporation is clearly beneficial to the corporation, a presumption of ratification will arise from slight circumstances. *Washington Savings Bank v. Bank*, 107 Mo., 133.

But it is contended by the defendant in error, that it is a charitable corporation, and so limited by its charter rights that it had no authority to engage in the business of operating a

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hotel, and that, even though it received and used the groceries it can not be required to pay for them.

The question presented by this contention requires a consideration of the precise corporate powers conferred upon the defendant in error by the act of its creation.

The Western Seamen's Friend Society was incorporated by a special act of the Legislature of Ohio, passed on the 23d of February, 1850. By this act the corporation was created "for the purpose of disseminating moral and religious instruction, and other charities amongst sailors and boatman doing business on our western waters."

The powers conferred upon it are expressed in the following language:

"And as such shall continue and have perpetual succession, with power to contract and be contracted with, prosecuting and defending suits, in all courts of law and equity, and to acquire, possess and enjoy, sell, convey and dispose of property, real and personal, or mixed, whether acquired by purchase, gift, devise or legacy, also of all property of which the society is now the legal and rightful owner; provided the annual income thereof shall not exceed the sum of forty thousand dollars.

"Sec. 2. The society shall have power to establish minor or lesser institutions, newspapers, magazines and such other auxiliaries in furtherance of its said object as may be deemed necessary, to have and use a common seal, and to change, alter or renew the same at pleasure, and to make, alter and amend such constitution and by-laws, rules and regulations for its government, the number and election of officers and admission of membership, as it may deem necessary and expedient."

If the Western Seamen's Friend Society has any authority to engage in the operation of a hotel, such authority must be founded on an implied power of the corporation, since the language above does not expressly empower it to engage in such an enterprise.

The doctrine of the implied powers of corporations has been liberally applied in Ohio, and has been invoked to sanction not only those acts of a corporation necessary and indispensable to the enjoyment of powers expressly given, but those that are appropriate, convenient and suitable for the accomplishment of

the purpose of its creation, and a reasonable choice is allowed in selecting the instrumentalities with which to accomplish such purpose.

The principles to be applied in determining whether a corporation is acting within its implied powers, are laid down in *The Central Ohio Natural Gas & Fuel Co. v. The Capital City Dairy Co.*, 60 O. S., 96, a part of the syllabus of which reads as follows:

"The implied powers which a corporation has in order to carry into effect those expressly granted, and accomplish the purposes of its creation, are not limited to such as are indispensable for these purposes, but comprise all that are necessary in the sense of appropriate, convenient and suitable, including the right of reasonable choice of means to be employed."

The same principles should be resorted to as are applied in ascertaining those of a corporation for profit in determining the implied powers of a charitable corporation. Reverting to the act whereby the Western Seamen's Friend Society was created, it will be seen that the express powers granted it are very broad. While its purpose is the "disseminating of moral and religious instruction, and other charities amongst sailors and boatmen doing business on our western waters," it is given power, in furtherance of this purpose, "to acquire, possess and enjoy, sell, convey and dispose of property, real and personal or mixed, whether acquired by purchase, gift, devise or legacy, also of all property of which the society is now the legal and rightful owner; provided the annual income thereof shall not exceed the sum of forty thousand dollars."

The purchase of the hotel property was clearly within the power of the defendant in error. Having by the exercise of authority expressly given it, acquired property, long used as a hotel, and therefore suitable for that purpose, and perhaps suitable for no other purpose when it undertook to devote that property to a use, from which it might reasonably expect to receive a profit for use in its charities, while at the same time it was maintaining an establishment, to which men of the class whose condition it was the purpose of the corporation to im-

prove, might resort for board and lodging, was it acting outside of its implied power?

In the light of all the circumstances, considering the purpose of the corporation, and the character of the property, and the use to which it had previously been put, we are of opinion that the question propounded must be answered in the negative. The proviso in the act of incorporation, that the annual income of the property of the corporation should not exceed forty thousand dollars, implies the right to devote its property to some income producing purpose. The Legislature, by the act of incorporation, also gave the corporation power to establish "newspapers, magazines and such other auxiliaries, in furtherance of its said object as may be deemed necessary." It would seem that by virtue of this power to establish "other auxiliaries," the operation of a hotel on its own property previously devoted to such purpose and fitted for its continuance, where sailors and boatmen doing business on our western waters might seek accommodations, would not do violence to the principle that a corporation has the right of reasonable choice of appropriate, convenient and suitable means of exercising and enjoying the powers expressly granted it.

But few cases involving the implied powers of charitable corporations, or corporations of a kindred nature, seem to have arisen, doubtless because the number of such is small compared to corporations for profit, but in *Dunn v. Agricultural Society*, 46 O. S., 93, it was held that the power granted to those composing an agricultural society to "perform all such acts as they deem best calculated to promote the agricultural and household manufacturing interests," conferred ample authority to hold fairs and charge for admission to them, and in *Moss et al v. Hufeth Academy*, 54 Tenn., 283, an educational corporation was held to have the power to borrow money for use in effecting the corporate purpose, the court saying, "the power might be fairly implied as a usual and appropriate means to accomplish the objects of the charter."

We do not intend to decide that under other circumstances a charitable corporation, such as the defendant in error, would

have the right to embark in the hotel business. We recognize the limitations placed upon the activities of corporations of this kind, and the views here expressed are based entirely upon the special facts before us in the evidence. We consider a further quotation from the syllabus of the case of *The Central Ohio Natural Gas & Fuel Co. v. The Capital City Dairy Co.*, *supra*, applicable to the situation before us:

"Acts of a corporation, which if standing alone or engaged in as a business, would be beyond its implied powers, are not necessarily *ultra vires* when they are incidental to, or form part of, an entire transaction, that in its general scope is within the corporate purpose. The validity of such a transaction is to be determined from its general character considered as a whole, rather than by segregation into individual facts, and each regarded as distinct from the others."

If the transactions by which the groceries were furnished by the plaintiff in error to the defendant in error were to be held to be outside the implied powers of the defendant in error, there is another ground on which the defense urged should not be sustained. The contract sued on is an executed one. The groceries have been furnished to the defendant in error and used by it. In all the transactions arising out of the operation of the hotel considered as a whole, up to the time the groceries in question were furnished, the defendant in error has received a profit, \$2,800 having been turned over to the society under the management of Fitzpatrick. It is claimed on behalf of the defendant in error that certain fixed charges such as interest, taxes and water rent would wipe out this supposed profit, but these charges would have to be paid no matter how the property was used, and at any rate, there was evidence tending to show a profit arising out of the conduct of the hotel during the period from March 15, 1905, to September 1, 1908.

The defendant in error is, therefore, in the position of having profited by the enterprise, which it is now claimed was in excess of its corporate powers. It has received the fruits of the contract between it and the plaintiff in error, but refuses to pay therefor.

The principle which we conceive should be applied in such a case as this is stated in *Larwell v. Hanover Savings Fund Society*, 40 O. S., 274. We quote from the opinion, page 285:

"The tendency of the courts, based upon the strongest principles of justice, is to enforce contracts against corporations, although in entering into them they may have transcended their chartered power, when they have received the consideration and the benefit of the contract, and it seems to be now the well established rule, that when a contract, not illegal, has been executed and fully performed on the part, either of the corporation or of the other contracting party, neither will be heard to object that the contract and such performance were not within the legitimate powers of the corporation."

See also *Herrick v. Wardwell*, 58 O. S., 308; *Norwalk, etc., Bank v. Norwalk, etc., Co.*, 14 C. C., 1 (affirmed 60 O. S., 603); *Bates v. Peoples, etc., Association*, 42 O. S., 655; *Hayes et al v. Galion, etc., Co.*, 29 O. S., 340; *Armstrong v. Karshner*, 47 O. S., 276; *Whitney Arms Co. v. Barlow*, 63 N. Y., 62; *Chester Glass Co. v. Dewey*, 16 Mass., 94.

We think that the defendant in error, even though a charitable corporation, having received and consumed the goods of the plaintiff in error, under the circumstances and with the result detailed, should be estopped from asserting that its contract under which they were furnished was *ultra vires*.

We are of opinion, for the reasons announced, that the motion to direct a verdict should not have been granted, and the judgment of the court of common pleas is reversed and the cause remanded for further proceedings according to law.

**SETTLEMENTS OF INDUSTRIAL INSURANCE POLICIES.**

Court of Appeals for Hamilton County.

**THE METROPOLITAN LIFE INSURANCE CO. v. OBERST BURBANK.  
ADMINISTRATOR OF THE ESTATE OF JAMES A. MULVEY.**

Decided, June 30, 1914.

*Life Insurance—Facility of Payment Methods Upheld as to Industrial Policies—Action Can Not be Maintained by Administrator on a Policy Paid as Directed Therein.*

Owing to the great volume of insurance done by industrial insurance companies and the necessity for prompt settlement in order to efficiently carry out the purpose of insurance of that class, and also for the protection of the companies against claims which might develop during the course of the legal administration of the estates involved, facility of payment provisions contained in such policies should be regarded with favor; and where it appears that payment was made strictly within the terms of the policy and in good faith on the part of the company and the proceeds were applied to payment of the funeral expenses and an unpaid board bill of the decedent, a motion lies to arrest from the jury an action brought by the administrator on such a policy and a verdict should be directed for the defendant company.

*Robertson & Buchwalter and Theodore C. Jung, for plaintiff in error.*

*William R. Collins, contra.*

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

The action below was brought by Oberst Burbank, as administrator of James A. Mulvey, deceased, to recover \$210 with interest and for an accounting, under a policy No. 42,660,077 issued by the Metropolitan Life Insurance Company upon the life of James Mulvey, November 8, 1909, then twenty years of age, on the payment of weekly premiums of ten cents.

The language of the policy contained the following facility of payment clause:

“The company may pay the amount due under this policy to either the beneficiary named below, or to the executor or ad-

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ministrator, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial; and the production of a receipt signed by either of said persons shall be conclusive evidence that all claims under this policy have been satisfied."

And for the purpose of naming the beneficiary and the relationship or situation he bore to the insured it contained the following language:

"Name of beneficiary and relationship to the insured, Geo. Loyd, Guardian."

The Metropolitan Life Insurance Company, as defendant, admitted the making of the policy and the death of the insured, and pleaded the payment of the entire amount due to George Loyd as the beneficiary named in the policy, and to one Mary E. Snider, who had united with said George Loyd in surrendering the policy of insurance and all the receipt books, and who claimed that the policy of insurance had been given to her by the insured as security for the payment of a board bill due and owing from him to said Mary Snider. It further stated that said George Loyd furnished proof that he was the beneficiary named in said policy of insurance, and that he and his wife had raised and brought up the said James A. Mulvey to the age of fourteen years and provided for his necessary wants. And it further stated that said George Loyd furnished proof to said company that he had incurred expense for the burial of said insured, and that the company had issued its check, which was duly paid, for the entire proceeds of said policy of insurance amounting to \$210.40 to the joint order of George Loyd and Mary E. Snider, and that said check was paid to said parties.

Upon trial it developed that the insurance company had made payment, in accordance with the allegations of its answer, before any claim had been made upon it by plaintiff or any other claimant under said policy.

On submission to the jury a verdict was rendered in behalf of the plaintiff for \$100.10, upon which a judgment was after-

wards entered. Error is prosecuted in this court for the purpose of setting aside such judgment.

From a careful examination of the record it appears that after the death of the insured proof of claim was promptly filed with the company by George Loyd as the beneficiary named in the policy, and that Mary E. Snider, who had possession of the insurance policy and receipts, also claimed some interest therein on account of money due her from the deceased. Upon investigation by the insurance company the entire amount due under the policy was paid under a check drawn by said company in favor of George Loyd and Mary E. Snider. Out of this check the entire funeral expenses were paid to the undertaker, and the balance of the money was divided in a manner satisfactory to the parties between said George Loyd and Mary E. Snider.

Defendant in error concedes that if George Loyd had been actually the legal guardian of James A. Mulvey, plaintiff could not maintain the suit. We do not understand that the statement in the policy showing "Name of beneficiary and the relationship to the insured" as "Geo. Loyd—Guardian" should be taken to mean that George Loyd was then the legal guardian of the insured, but rather that the relationship which he bore to the insured was somewhat similar to that of a guardian, and the policy gave that as the relationship of the parties.

Industrial insurance companies because of the great volume of business done by them, evidenced in this case by the high number of the policy in question, have usually by the form of their policies provided for payments thereunder in a manner that will promote prompt settlement to carry out efficiently the purpose of such insurance and at the same time to protect the company against other claims which might develop upon a legal administration of an estate. The amounts involved are comparatively small and the benefits to be derived largely depend upon a prompt payment, as the fund is usually necessary to provide for burial and other expenses incurred upon the emergency of death.

Questions arising under payments made under the facility of payment clause of insurance policies of a similar character

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have been frequently brought before the courts, but because of the small amount involved they are usually found in the reports of the lower courts.

In *Thomas v. Prudential Ins. Co. of America*, 63 N. E. (Ind.), 795, at page 796 the law is thus stated:

"In *Insurance Co. v. Schaffer*, 50 N. J. Law, 72 (11 Atl., 154), it was said: 'The purpose and object of this kind of insurance seemed to require the payment to be made in that way, and it should, in good policy, be upheld. Unlike the ordinary life insurance, small sums are provided by these industrial policies to be paid at once on proof of death and surrender of policy. \* \* \* The terms and manner of insurance contemplate speedy payment to the family of the assured, immediately after his death, to provide a burial fund, or to meet the expenses which, in such an emergency, must be incurred.' Before actual payment by the company to some of the persons named in article second, an action might, perhaps, be maintained by the executor, administrator, or beneficiary, for the amount named in the policy; but when such payment has actually been made, by the express terms of the policy it operates as a complete discharge of the company from further liability."

See also: *Thompson v. Prudential*, 119 App., Div. (N. Y.), 667; *Thomas v. Prudential*, 24 Atl. (Penn.), 82; *Wilkinson v. Metropolitan*, 63 Mo. App., 404.

Parties when not prohibited by law from so doing are at liberty to make their own contract, and within limits to provide what shall be evidence of certain facts. In this case the payment made by the company seems to have been directly within the terms of the policy. It was made to the beneficiary named in the policy upon the production of the policy and receipts for premiums paid thereunder, by him in conjunction with Mrs. Snider, who had a small claim for money advanced. The fact that the local agent of the company at the time of this payment insisted upon seeing that out of the amount so paid the undertaker's bill and the funeral expenses should be paid, and the fact that for convenience the entire check was endorsed over to the undertaker and that he gave checks for the difference, or how that difference was divided between Mr. Loyd and Mrs. Snider, or that the undertaker appeared to have made a

certain discount upon the funeral bill in favor of the beneficiary, can make no difference as to the validity of the payment, which was made in strict accordance with the terms of the policy.

There is nothing in the record to show any want of good faith on the part of the insurance company nor that its action in making the payment as it did under the policy was violative of the rights of any claims that were brought to its knowledge. The motion of the defendant to arrest the cause from the jury and direct for the defendant should have been granted.

The judgment is therefore reversed and judgment entered here for plaintiff in error.

#### DEATH OF THE INSURED BEFORE DELIVERY OF THE POLICY.

Court of Appeals for Geauga County.

THE COLUMBUS MUTUAL LIFE INSURANCE COMPANY v. MABEL MAY FORD.

Decided, February Term, 1914.

*Life Insurance—Contract for, Complete, When—Delay in Delivery of Policy—Where Without Excuse Does Not Invalidate the Contract—Notwithstanding Death of the Insured Occurred before Delivery Was Made.*

1. On the 23d day of June, 1910, upon the solicitation of the agent of the company, deceased made application for a policy of life insurance for \$1,000 on the twenty payment life plan and paid the first premium to the satisfaction of the agent, who accepted the application and premium and agreed for the company that it would issue a policy for the amount stated and on the plan stated, if the medical examination of the applicant, to be made by the company's medical examiner, should disclose that the applicant was in sound, insurable condition of health. This examination was made on the fourth day thereafter and the result thereof reported to the company by its medical examiner. The company, finding the report satisfactory, issued a policy in conformance with the application and sent the same to its agent to be delivered to the

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insured. The agent finding the insured seriously ill with typhoid fever, refused to deliver the policy, and by direction of the president of the company returned the same to the company. The insured died four days after the receipt of the policy by the agent. *Held:* There was a completed contract between the parties for insurance and that the company was liable for the amount of the policy.

2. Upon the application made as above stated, and payment of premium by note to the agent, the medical examiner of the company made examination of the applicant on the 27th day of June, but through his own neglect did not forward the company his report of such examination until the 7th day of July following, the same being received by the company July 8th, and the report being approved by the company a policy was issued to the applicant, as provided for in his application, and mailed to the agent on July 14th, to be delivered to the insured, but was not delivered owing to the then condition of the health of the insured. The insured was taken ill on the evening of the 7th of July and was visited by a physician, such physician being the medical examiner of the insurance company who had previously examined him for the company. On this visit the physician expressed the opinion that the insured was threatened with typhoid fever, of which disease he died July 18th. The insured had no information that the report of the medical examination had not been forwarded to the company immediately following the making thereof, which should have reached its office by due course of the mail the next day after the mailing of the same. Deceased said nothing to the physician, who was the medical examiner of the company, during the time he attended him in his last illness about making any report to the company of his illness nor did he otherwise notify the company of the same. *Held:* That all of the terms of the contract of insurance were agreed upon between the parties before the last illness of the insured and the fact that the insured did not give any direct notice to the company otherwise than to its medical examiner of the changed condition of his health after the evening of July 7th, did not avoid the policy and the company was liable thereon.
3. Where an insurance company seeks to avoid the payment of a policy of life insurance by reason of the fraudulent concealment of the changed condition of the health of the insured after the making of the application, such defense to be made available must be pleaded and such fraudulent concealment properly alleged in its answer.

*J. M. Sheets and R. S. Parks, for plaintiff in error.*

*J. Buchwalter, contra.*

of such illness and change in his physical condition, and that because he did not do so there was such fraudulent concealment on his part that avoided the policy.

In answer to this it might be urged first, that no such issue is made by the answer; that if the plaintiff in error intended to rely upon such facts as claimed in this case, it was its duty to set up same in its answer. Upon that question we think the case of *Moody v. Insurance Company*, 52 Ohio St., 12, is decisive and it is supported by the following authorities: *Port Blakely Company v. Hartford Insurance Co.*, 50 Wash., 664, reported in 97 Pac., 781; *Taylor v. Modern Woodmen*, 42 Wash., 389, reported in 84 Pac., 867, and see authorities cited by counsel on page 869; *Bliss on Code Pleading*, 3d Ed., Section 356a; *Nash Pleading*, 300, 382, 782; *Kahnweiler v. Phoenix Insurance Co.*, 67 Federal, 483.

But, was there any fraudulent concealment in this case, or, in other words, was it the duty of Moses Ford to notify the company after he was taken ill of the change in his physical condition? The rule relied upon by plaintiff in error is probably as well stated in *Thompson v. Travelers Insurance Company*, 101 N. W. (N. D.), 900, as anywhere in the following words:

"Where, pending negotiations for a contract of life insurance, a material change in the condition of the applicant's health occurs, such as would influence the judgment of the insurer in accepting or declining the risk, the applicant is under obligation to make disclosure of the fact."

Numerous authorities are cited by counsel in support of that rule. Perhaps the leading one is *Piedmont & Arlington Life Insurance Company v. Ewing*, 92 U. S., 377, the syllabus of which is as follows:

"While negotiations were still pending between an agent of the company and the applicant, touching the precise terms of a contract of insurance, the amount of the premium and the mode of payment, a friend paid the premium, but concealed from the agent the condition of the applicant, who was then in *extremis*, and died in a few hours. The agent, in ignorance of the facts, delivered the policy. *Held*: That no valid contract arose from the transaction."

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But, Mr. Justice Miller, on page 382, we think very clearly distinguishes that case from the one we have here in the following language:

"This case differs very widely from those cited in which a delay in payment has been treated by the court as waived. All such cases proceed on the ground that a valid agreement as to the terms of the contract has been made."

What part of the contract between Moses Ford and the insurance company still remained open? What, if any, negotiations between the parties were still pending and undisposed of as to the terms of the contract? The amount of the policy was agreed upon, the kind of policy was agreed upon, the amount of the premium was determined between the parties and was actually paid. The only question that remained open at the time the agent called upon Moses Ford in his harvest field was whether the condition of his health at that time was sufficiently sound to warrant the company in issuing to him a policy

That question was disposed of within a few days by the medical examination made by the medical examiner of the company, and he was found to be in an insurable condition of health, so that when that examination was made the entire contract was concluded and closed and the minds of the parties met, and all that remained to be done was for the insurance company to issue the policy, which it did. This, we think, is settled in the case of *Insurance Company v. Higginbotham*, 95 U. S., 380, where the following principle is announced:

"*Held*: That the representations of the insured as to the condition of his health on the 1st of October, when he applied for the reinstatement of his policy, and paid the premium, were not continuous until the 14th of that month; and that the contract was consummated on the day when the premium was paid."

See also *DeCamp v. M. J. Mutual Life Insurance Company*, 7 Fed. Cases, 313, case No. 3719, 3 Ins. Law J., 89, and in *Southern Life Insurance Company v. Kempton*, 56 Georgia, 339, we find a leading case on this subject. In the syllabus in the case it is said, referring to a case similar to the one we have:

"In such a case as this, the principle that any change in the health of the applicant between the time of the application and of the issuing of the policy, would relieve the insurance company from consummating the contract, does not apply; the delivery of the agent, under the facts, was a consummation of the policy, and that, with the other facts proven, show a consummation of the contract."

In *Keim v. Home Mutual Insurance Company*, 42 Mo., 33, also 97 Am. Dec., 291, it is said:

"It is laid down by Angell that when the negotiation for insurance is so far completed that nothing remains to be done but to deliver the policy corresponding with the terms and date of application, should a loss occur before the execution of the policy, a court of equity would relieve the assured." 1 *Duer on Insurance*, 66, Section 10.

In *Baldwin v. The Chouteau Insurance Company*, 56 Mo., 151, and 17 Am. Rep., 671, we find the following:

"In May on Insurance, Section 44, it is said that the agreement for insurance is complete when the terms thereof have been agreed upon between the parties, and the reciprocal rights and obligations of the insurer and the insured, date from that moment, without reference to the execution and delivery of the policy, unless these two elements are embraced within the terms agreed upon."

"Where, after oral contract of insurance, the premium is accepted and the policy delivered, it relates back to the making of the oral contract, and the assured is not bound at the time of paying the premium and receiving the policy to voluntarily inform the insurer of the destruction of the property." *Worth v. German Insurance Co.*, 64 Mo., 583.

We also cite *Gordon v. U. S. Casualty Company*, 54 S. W., 98, a Tennessee case of 1889; *Leichman v. Insurance Company*, 44 L. J., C. P., 185, 32 L. T., 170; 23 W. R., 723, an English case. See also *Flint v. Ohio Insurance Company*, 8 Ohio, 501.

We find none of the cases cited by counsel for plaintiff in error that conflict with the rule we have attempted to discuss. In *Cable v. U. S. Life Insurance Company*, in New York, 111 Fed., 19, the policy had a clause that it should take effect only upon

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payment of the first premium and "delivery of policy during my life time in sound health and insurable condition." Cable had previously declined to accept the policy. In *Mutual Life Insurance Company v. Pearson*, 114 Fed., 395, it was provided in the policy that the insurance shall not take effect "until the first premium shall have been paid during my continuance in good health." Pearson was taken sick January 6th. January 7th the first premium was paid, the company not knowing of his illness, and on January 8th, he died. The question is on demurrer, on equity jurisdiction of the court to cancel policy.

In *Thompson v. Travelers Insurance Company, supra*, the condition of the policy was that "this policy shall not take effect until the first premium is actually paid by the insured in good health." It is not claimed in this case that the assured was not in good health at the time he signed the application or at the time he was examined by the medical examiner of the company. It is not claimed that there were any misrepresentations made by him at any time. In the light of the authorities above cited we do not think there was any fraudulent concealment on the part of Moses Ford. The headquarters of the company were in Columbus, Ohio. The time it would take to reach Columbus by the usual course of mail is less than twenty-four hours. Ford was examined on the 27th day of June. If the result of his examination had been reported to the company on the day it was made, it should have reached the company on the 28th day of June. This is shown by the fact that Dr. Heely's report was mailed July 7th and reached the office of the company July 8th. Assuming if Dr. Heely had forwarded the application when he should have done so, on the 27th day of June, it should have reached the company's office on the 28th of June, and the policy should and would have been issued and in the hands of Ford long prior to the 7th day of July, when, it is said, he was taken ill. As we have stated, he knew nothing of this delay. He had a right to assume that the policy had been issued and was in the hands of the agent for delivery to him. The premium had been paid and accepted and everything required of the assured had been done. To say that when he was taken ill on July 7th,

long after the application for insurance and the medical examination had been made, it was then his duty to make additional disclosures to the company as to the condition of his health, we think is not supported by any authorities cited by counsel for plaintiff in error, but is opposed to all the authorities we have been able to find.

See on this question *Hartford Protection Insurance Company v. Harner*, 2 Ohio St., 452, opinion of Judge Ranney, 472-473.

Again, the medical examiner was appointed by the company to ascertain and report the physical condition of the applicant, Moses Ford. He was the only representative of the company in that regard known to the deceased, so far as the record shows. Whatever disclosures as to the condition of his health required to have been made by him should have been made to the medical examiners. This is manifestly true at the time of the examination. On the 7th of July the medical examiner sent his report of the examination of Ford to the company. On the same day he visited Ford and found him threatened with typhoid fever and was thereafter his attending physician until his death. It does not appear whether the deceased said anything to the doctor about his insurance policy, or of his making any additional report to the company in regard to his sickness, but what need therefor? The doctor was the medical examiner of the company, and the direct representative of the company to ascertain and report the physical condition of Ford, and he knew better than Ford did the prognosis of his disease. Being the agent of the company to report as to the health of applicants for insurance in the company, and especially as to Ford's health, we think his knowledge of Ford's illness must be imputed to the company; that the company must be held to know what their agent knew and failed to report.

The judgment of the court of common pleas will be affirmed.

## JURISDICTION OF JUSTICE OF THE PEACE.

Circuit Court of Cuyahoga County.

M. SWEE ET AL. V. LOUISE BREGENZER.

Decided, February 12, 1912.

*Appeal from Justice Court—Action for Money Had and Received on Rescinded Land Contract.*

A justice of the peace has jurisdiction of an action for money had and received, though that money was had and received as part payment on a contract for the conveyance of real estate, defendant refusing to convey and plaintiff electing to treat the contract as rescinded; hence such action is appealable to the common pleas court.

*James Metzenbaum, for plaintiff in error.*

*Halle & Geisner, contra.*

NIMAN, J.; MARVIN, J., and WINCH, J., concur.

The plaintiffs in error sued the defendant in error in the court of a justice of the peace. The bill of particulars stated a cause of action for money had and received. A judgment having been rendered in the justice court against the defendant in error, she appealed the case to the court of common pleas. The petition filed in that court, after averring that the case came into the court on appeal, from the court of the justice of the peace, stated a cause of action in the following language:

“Plaintiffs, for their further cause of action, say, that on or about the 19th day of April, 1909, plaintiffs paid to this defendant the sum of one hundred (\$100) dollars for and in consideration of the defendant promising and agreeing in writing, to convey to these plaintiffs a certain parcel of property.

“Plaintiffs further say that said defendant received said sum of money, but has never conveyed said premises to these plaintiffs, and had instead, conveyed said premises to other persons, and has failed, neglected and refused to convey said premises to plaintiffs, or either of them, though demanded by plaintiffs.

"The plaintiffs further say that they have made demand of said defendant for said sum so had and received by this defendant of said plaintiffs, but that said defendant has wholly failed, refused and neglected to return said sum to said plaintiffs."

The defendant in error filed a motion in the court of common pleas to dismiss the action, on the ground that the cause of action stated in the petition was on a contract for the purchase of real estate, and that the justice of the peace had no jurisdiction of such an action, and that the court of common pleas had no jurisdiction thereof on appeal.

This motion was granted, and by this proceeding in error we are asked to reverse the judgment of the court below in dismissing the action.

Section 10232 of the General Code provides that justices shall not have cognizance of any action on contracts for real estate.

If the cause of action set forth in the petition is one on a contract for real estate, the court of common pleas would have no jurisdiction over it on appeal against the objections of the defendant, unless she expressly or impliedly waived her right to object.

The identity of the cause of action stated in the petition with that set forth in the bill of particulars is clear. The latter in brief terms states a claim for money had and received, while the former alleges with greater detail the facts from which the law implies an obligation of the same character as that which was the foundation of the action in the justice court.

The cause of action is not based upon any stipulation in the contract referred to in the petition. That contract, according to the allegations of the petition, is no longer subsisting. It has been rescinded by the defendant, and the plaintiffs, accepting that rescission, and recognizing that the contract has no longer any existence, sue to recover the money paid by them while it was a subsisting contract. In such a case the law raises an obligation which may be enforced in an action as for money had and received. While it may be necessary for the plaintiffs to resort to the contract as evidence to establish their right to

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recover, the action itself is not on the contract. In these views we are supported by *Halloway v. Davis*, Wright, 460, the syllabus of which reads:

"Where money has been paid on a contract which has been rescinded, or put an end to, or which the defendant has refused to perform, it may be recovered back in an action for money had and received."

It was also held in *Middleport Woolen Mills Co. v. Titus*, 35 O. S., 253, as follows:

"Where money has been paid on a contract which has been subsequently rescinded, and the repayment of the money is the only thing remaining to be done, a petition for money had and received is sufficient; but while the contract is subsisting the action can only be brought on the agreement."

See also *English et al v. Brooks*, 4 O. D. Rep., 43; *Newman v. McGregor*, 5 Ohio, 349; *Brown v. Timmany*, 20 Ohio, 87.

It follows from the conclusion stated as to the nature of the cause of action set forth in the plaintiffs' petition, that it was one which the justice of the peace had jurisdiction, and being in the court of common pleas on appeal, that court had jurisdiction, and the motion to dismiss should not have been granted.

The judgment of the court of common pleas is reversed and the cause remanded for further proceedings according to law

**INJURY FROM FALL INTO A DANGEROUS AND LONG  
NEGLECTED HOLE IN BOARD WALK**

Circuit Court for Lucas County.

COUNTY COMMISSIONERS OF LUCAS COUNTY AND COUNTY COM-  
MISSIONERS OF WOOD COUNTY V. CLAUDE D. ENGLISH.

Decided, June 29, 1912.

*Negligence--Duty of One Using a Walk to Exercise Ordinary Care--  
Regardless of Other Matters Occupying His Mind--Whether Such  
Care Was Used is a Question for the Jury.*

1. The fact that a telephone lineman was performing a legitimate duty in looking up and closely watching the telephone wires to see whether they touched each other when swayed by the wind, did not excuse him from exercising ordinary care as to where he stepped and the condition of the walk over which he was passing; and where one so engaged stepped into a dangerous hole and was severely injured, a finding by the jury under proper instructions by the court that he was exercising proper care at the time and the verdict and judgment based thereon will not be disturbed by a reviewing court.
2. Exhibits which were offered in evidence and as to which a witness was examined and cross-examined and which were shown to the jury and referred to by counsel on both sides as being in evidence, will be regarded by a reviewing court the same as if formally offered in evidence although not marked as exhibits in the case.

*Holland C. Webster*, Prosecuting Attorney of Lucas County, *Lewis E. Mallow*, Assistant Prosecuting Attorney of Lucas County, and *Charles Hatfield*, Prosecuting Attorney of Wood County, for plaintiffs in error.

*Edgar M. Flowers* and *Marshall & Fraser*, contra.

RICHARDS, J.; KINKADE, J., concurs; WILDMAN, J., not participating.

Error to the Court of Common Pleas of Lucas County.

In the court of common pleas Claude D. English recovered a verdict and judgment in the amount of \$7,500 against the county

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commissioners of Lucas county and the county commissioners of Wood county for personal injuries claimed to have been suffered by him by reason of the negligence of the defendants. The injury occurred on January 3, 1911, between 4:30 and 5 o'clock P. M., as plaintiff was walking on the highway nearing the approach on the Wood county side of the bridge crossing the Maumee river at the village of Maumee. The dividing line between the two counties is the center of the river at the place where this bridge is constructed, and the bridge and its approaches appear to have been constructed and maintained by joint action of the boards of county commissioners of the two counties. The level of the bridge is about eight feet above the level of the county road on the Wood county side of the bridge, and the bridge proper is reached by a sloping approach constructed of earth. Along the up-river side of the bridge a wooden sidewalk or approach is constructed, perhaps twenty feet in length, being built over the up-river slope of the bank of earth. Several of the planks of which this walk was constructed were missing on the occasion of the injury, and the approach to the bridge proper had been defective in that respect for a long period of time, some witnesses stating it as long as two or three years.

The plaintiff was a telephone lineman and upon the occasion of his injury was in the performance of his duty, walking along under the wires which were strung on poles, the wires when they reached the bridge being strung on arms across the bridge. Trouble in the transmission of messages had been experienced and he was watching the wires to ascertain whether, in the high wind that was blowing, the wires were being blown together so that they touched and thereby interfered with the use of telephones. Snow and sleet were falling at the time, and it was growing dark so that he could, with difficulty, see the wires but with the purpose mentioned, he was walking under the wires and approached the bridge. He reached the sidewalk where the planks were missing, stepping into the hole and falling in such a manner as to be very seriously injured. The hole into which he fell was several feet square and perhaps

ten inches deep at its shallowest place, growing much deeper at the other side by reason of the sloping embankment over which the walk had been constructed. The stringers under the walk were two inches thick and ten inches wide, and were placed edgewise, being built of this heavy material for the purpose of supporting the walk along the side of the sloping embankment.

It is contended by plaintiffs in error that the verdict is excessive and is not sustained by sufficient evidence, and that the court erred in not directing a verdict for the county commissioners, and in overruling a motion for a new trial, and that the judgment should be reversed by reason of misconduct of plaintiff's counsel during the argument of the case in the trial court.

It will not be necessary to dispose separately of all the claimed grounds of error. The case merits and has received a very careful examination of the entire record. Some conflict exists in the evidence as to the extent and permanency of the injuries suffered by the plaintiff, and much expert evidence was introduced bearing upon that matter. The evidence is such that a jury would be entirely justified in finding the injuries to be permanent, and of a very serious character. We do not feel justified in disturbing the verdict on the claim that it is excessive, nor are we able to find from the record that the verdict is not sustained by the evidence. Much insistence is placed by counsel for the county commissioners on the claim that the plaintiff was guilty of contributory negligence, directly producing the injuries suffered by him, in that he was following the wires with his eyes instead of watching the walk in front of him, as he proceeded toward the bridge. He was, of course, in the performance of a legitimate business, but was not relieved thereby from the duty to exercise ordinary care under all the circumstances of the case. Whether he did do so was left fairly to the jury, under appropriate instructions from the trial court, and we do not, therefore, feel at liberty to disturb the verdict on the ground that it is not sustained by sufficient evidence. It may be noted that no doubt whatever exists that this defect was one which was extremely dangerous to pedestrians, and the walk

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had clearly been in this defective condition for a long period of time so that the defendants had or should have had, in the exercise of ordinary care, full notice of the same.

Another ground upon which it is sought to have the judgment reversed is the claimed misconduct of counsel for plaintiff in the argument of the case to the jury. It appears from the bill of exceptions that a witness, named Dr. Rhonehouse, had been subpoenaed on behalf of the plaintiff, and was not used by him, and that later this witness was used by the defendants, and upon his attempted cross-examination by counsel for the plaintiff, certain of his evidence was excluded as not being a proper examination at that stage of the case. This exclusion of his evidence occurred by reason of the objection of counsel for the county commissioners. These facts were alluded to by counsel for the plaintiff in his argument to the jury, to which body he propounded the question "Who is responsible for him not testifying?" Counsel was thereupon stopped by the court but proceeding further stated that if counsel for the defendants had not objected, Dr. Rhonehouse would have answered. The court stopped any further reference to this matter, and it nowhere appears in the record that the jury were informed what the testimony of Dr. Rhonehouse would have been if he had been allowed to answer. It does appear that he had been subpoenaed by the plaintiff and placed upon the witness stand by the defendants. It further appears that he had treated the plaintiff as a physician for some considerable time following his injuries. The orderly administration of justice would have been better served if counsel had omitted any reference to this matter in his argument to the jury, but no prejudicial error resulted from what was said.

We have examined this case and passed upon the material assignments of error as if the bill of exceptions contained all of the evidence. It may be doubted, however, whether the condition of the record is such that we would be entitled to pass upon the weight of the evidence, by reason of the fact that certain exhibits referred to during the trial are not attached to the bill. Much evidence was offered relating to certain X-ray plates taken of var-

ious portions of the plaintiff's body by a witness, Harry W. Dachtler, who describes his profession as that of a Roentgenologist. He had taken numerous X-ray pictures, some at the request of the plaintiff and some for the defendants, and while upon the witness stand and under examination in chief by counsel for plaintiff, stated these facts and referred to the plates taken at the request of the plaintiff as Nos. 5732, 5733, 5734 and 5855. He then stated that he had plates which he took for the defendants but did not have them with him. Counsel for plaintiff then said "We offer those plates in evidence." If the record stopped at this point, some doubt might well exist as to the plates referred to in the offer made by counsel for plaintiff. The cross-examination of the witness, however, was immediately commenced, and during that cross-examination at various places the plates taken upon the request of the plaintiff were referred to as being in evidence and were shown to the jury, who examined the same by means of an illuminating box with lights behind a ground glass, for the purpose of having a more accurate and thorough examination. This witness, after having being fully qualified as a Roentgenologist testified in detail as to the facts shown by these plates, and the bearing they had upon the extent of the injuries suffered by the plaintiff and the condition of his body. He was also permitted to state his opinion on these matters. The plates thus became evidence of a very material character, and we think in view of the fact that the plates taken at the request of the plaintiff were referred to by counsel for both sides as being in evidence, and shown to the jury and examined by them, they must be treated as if formally offered in evidence although not marked as exhibits in the case. While the absence of these exhibits would perhaps prevent this court from considering the question of the weight of the evidence, we have, as already stated, examined the entire record and find no prejudicial error manifest therein.

The judgment of the court of common pleas will be affirmed.

**POSSESSION OBTAINED OF A DEED UNDER FALSE PRETENSES.**

Circuit Court of Cuyahoga County.

**J. A. C. GOLNER V. STATE OF OHIO.**

Decided, February 13, 1912.

*Criminal Law—Indictment—Inconsistent and Repugnant Counts—Obtaining Property Under False Pretenses—Deed of Farm Without Possession Obtained—Cross-Examination of Accused.*

1. Three counts in an indictment for obtaining property under false pretenses are not inconsistent or repugnant, the first of which charges that it was falsely represented that Snyder owned property on the lake shore east of Cleveland, the second that Pollock owned property on the lake shore east of Cleveland and the third that Snyder and Pollock jointly owned certain property, describing it, on the lake shore east of Cleveland, the title being in Pollock with authority from Snyder to convey.
2. The crime of obtaining property under false pretenses is made out, if the property obtained unlawfully under the false pretenses is a deed selling and conveying a farm to another, though possession of the farm was never surrendered by the prosecuting witness.
3. The cross-examination of a defendant in a criminal case who offers himself as a witness, as to shady transactions which the questions assume he was connected with, such cross-examination being solely for the purpose of testing his credibility, is limited only by the sound discretion of the court, and a judgment will not be reversed for permitting such cross-examination, unless it appears from the record that such discretion was abused to the prejudice of the accused.

*Westenhaver, Boyd, Rudolph & Brooks*, for plaintiff in error.  
*J. A. Cline and W. D. Meals*, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

Plaintiff in error was convicted of obtaining property under false pretenses from one E. W. Reeves, who was the owner of a farm of 168 acres in Brecksville township, Cuyahoga county, Ohio.

While numerous false representations are alleged in the indictment to have made and to have induced Reeves to part

"The court might properly have charged that the jury might convict if it found that the representation had been made that Snyder owned the lots, or if it found that the representation had been made that Pollock owned the lots. but it could not convict if it found that both representations had been made, because they are inconsistent and repugnant; both can not be true; one contradicts the other."

One answer to this is that the jury might well have found from the evidence that the representations were not as to concurrent ownership by Snyder and Pollock. It was first represented that Snyder was the owner and thereafter that Pollock was the owner. There is nothing inconsistent in such representations, if it was represented that meanwhile title had passed from one to the other, and said suggestion is borne out by the evidence.

Nor can it be said that if the jury should find that it was represented that Snyder once owned the lots and thereafter Pollock owned them, that the representation that Snyder owned them ceased to be material and would not warrant a conviction, for there is another aspect of the representation regarding Snyder's ownership—such representation tended to mislead Reeves into a belief that he was dealing with men of substantial means and evident financial responsibility. He might properly conclude that though Snyder had conveyed the lots to Pollock, the latter had paid value for them which would leave Snyder worth as much in money as he had been worth in land, and he was to have Snyder's endorsement on the notes.

This thought becomes more important in consideration of the next assignment of error.

It is claimed that the indictment does not charge Golner with the crime which the record shows was committed by him.

On this proposition it is argued by counsel for Golner that the only false representation which had a decisive influence upon the mind of Reeves and caused him to part with his property was the representation that the lots described in the mortgage were, in fact, the lots located at stop 130½ which had been pointed out to him by Snyder; that it was this belief which

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caused him to part with his title; that without this belief he would not have parted with it, and this false representation is nowhere charged in the indictment, for the indictment alleges only that it was represented that the lots described in the mortgage were on the lake front, and not that they were at stop 130½ and were the same lots pointed out by Snyder.

There is some degree of sophistry in this argument.

We can not know with certainty that only one of the many false representations made to him had a decisive influence upon the mind of Reeves. It may have been and it probably was all of them together which brought about that state of mind which induced him to part with his title.

It is but a matter of evidence that the land represented as owned by Snyder, and pointed out to Reeves at stop 130½ and then represented as owned by Pollock, is the same land as that which was represented as being lake front property and included in the mortgage.

It was alleged in the indictment that it was represented that Snyder was the owner of a valuable tract of land which had a frontage on the shore of Lake Erie east of the city of Cleveland. It was shown in evidence that the land Snyder was represented to own was at stop 130½.

It was alleged in the indictment that Pollock was the owner of a valuable tract of land which had a frontage on the shore of Lake Erie, which real estate was situated east of the city of Cleveland. It was shown in evidence that the land Pollock was represented to own was at stop 130½.

It was alleged in the indictment that the ten lots described in the mortgage were represented as located on the shore of Lake Erie. It was shown in evidence that the particular place on the shore of Lake Erie where they were represented as located was at stop 130½.

There was proof, then, of each representation, and, if the indictment alleges a crime, that crime was proved.

As already said, the representation as to Snyder's ownership of lake front property was not only material as connecting his representation with Reeves' mistake in supposing the land

described in the mortgage was on the lake front, but as inducing him to believe that Snyder was a man of financial responsibility and so, that he could trust him and those who claimed to represent him and be interested with him.

The same may be said of the representation as to Pollock's ownership of the land.

As to the representation that the land described in the mortgage was upon the lake front, that was material, for it is a matter of common knowledge that lake front property near the city has an increased value by reason of said frontage. Its exact location at stop 130½ was not so material, and we can not say that Reeves would not have been induced to part with his property if the land he supposed was described in the mortgage had never been pointed out to him, but all that had been represented was that it had a lake frontage.

The questions thus far discussed cover many of Golner's requests to charge which the court refused to give, and reference will therefore be made only to those requests which involve other questions.

By request number 17 the court was asked to charge that representations regarding the lands described in the mortgage, so far as they related to the *joint* ownership of said lots and the authority of Pollock from Snyder to convey said lots to Reeves, were *wholly immaterial* because it is not denied in the indictment that *Pollock* had title to said lots, and full authority to convey the same, though the truth of the representation as stated in the verdict is negatived in the indictment.

The representations of joint ownership of Snyder and Pollock and Pollock's authority to convey are not wholly immaterial, for they connect up with the former representations that Snyder was the owner, and make plain the whole scheme of deception planned by Golner, one inducement and one representation naturally leading on to another, the whole having such consequence as to induce Reeves to part with his property, but being so insidiously interwoven that we can not say that any one representation would have induced Reeves to act; or that he would not have acted if any one representation had not been

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made. This inquiry was properly put before the jury for its final answer.

Pollock's sole and undivided ownership of the lots described in the mortgage needed no denial, for no such representation had ever been made to Reeves. If it had been made it would undoubtedly have made him suspicious, for he had previously been told a different story.

By the twenty-second and twenty-third requests the jury's attention was called to the defendant's claim that Reeves never parted with the possession of his farm.

As the charge in the indictment was only that by reason of the false pretenses, the defendant unlawfully obtained from Reeves a deed of general warranty, selling and conveying his farm to Pollock, these requests were properly refused. *State v. Toney*, 81 O. S., 130.

The defendant twice submitted his requests to charge, once before argument and again, the same requests, after argument.

The court refused to give the requests before argument though some of them were given after the argument.

We are content to let this question rest upon the decision in the case of *Umbenhauer v. State*, 4 C. C., 378, where it was held:

"Upon the trial of a *criminal* case it is not error for the court to refuse to instruct the jury, at the request of the defendant, upon matters of law, before the argument begins."

That case was affirmed by the Supreme Court without report, 23 W. L. B., 167.

The defendant submitted himself as a witness in his own behalf and was cross-examined by the prosecuting attorney; in that cross-examination he was asked many questions with regard to a shady transaction about some Beach City bonds, with which the state tried to connect him. Most of his answers were denials but it is claimed that it was wrong to permit inquiry as to this collateral matter, for it amounted to an attempt to prove another distinct offense, for the purpose of raising the inference of the prisoner's guilt of the particular crime charged, which would

be prejudicial error, as explained in the case of *Hanoff v. State*, 37 O. S., 178, at page 180.

A reading of the remainder of said opinion, however, shows that such examination of a witness, whether defendant or not, for the purpose of testing his credibility, rests in the sound discretion of the court, and a judgment will not be reversed for permitting such cross-examination, unless it appears from the record that such discretion has been abused to the prejudice of the party.

There was no such abuse of discretion in this case; such answers as Golner gave to questions asked him probably tended to shake the confidence of the jury in his credibility and were legitimate for that purpose.

The weight of the evidence in this case is so overwhelming as to the guilt of plaintiff in error, that that question has not been raised in this court. The several technical objections raised by his counsel have not been without difficulty, but, being of opinion that there is no reversible error in the record, the judgment is affirmed.

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**CLAIM FOR SERVICES RENDERED BY A MEMBER OF  
THE FAMILY.**

Circuit Court for Lucas County.

CHARLES A. BROWN v. HARRIET E. FARR.

Decided, February 10, 1912.

*Pleading—Defects in, Not Fatal to Recovery of Judgment, When—  
Indentured Girl Seeks to Recover for Services Rendered After She  
Reached Her Majority—Contracts Express and Implied—Proof  
Upon Which Contract Must Rest—Charge of Court.*

1. A judgment will not be reversed solely by reason of a defect in the petition in failing to aver that the amount claimed is due, where issues have been joined and the cause tried on its merits and it appears from the record that the defective petition did not result in prejudice to the adverse party.
2. Where it is clearly apparent that the plaintiff was led to sign the release relied upon by the defendant through a misunderstanding as to its character, or it appears that the instrument signed was

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a mere *nudum pactum*, it is not necessary to set the instrument aside by a separate action nor to demand a cancellation of such release by a separate cause of action.

3. No contract to pay for services can be implied where a family relationship existed between the parties, but such a contract must be established by clear and unequivocal proof; and this rule is as applicable to an action against the head of a family during his lifetime as against his administrator after his death.

*Ray & Cordill*, for plaintiff in error.

*James H. Southard*, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to the Court of Common Pleas of Lucas County.

The original action in the court of common pleas was brought by Harriet E. Farr to recover of Charles A. Brown upon two causes of action set forth in her petition. In the first cause of action she claimed a balance of \$5.50 upon a promissory note executed by Brown to her. In the second cause of action, she claimed a sum of about \$750 for services claimed to have been rendered by her to Brown.

It appears from the evidence that Harriet E. Farr had been an inmate of the Children's Home near Maumee, and that she was indentured to Brown until she was eighteen years of age, at which time he was to pay her the sum of \$50, and that she continued to reside in the family of Brown as a member thereof for some years after she became of age. Upon her arriving at the age of eighteen he executed to her a note in the sum of \$50 upon which he subsequently paid \$10, and upon September 25, 1909, he paid to her the sum of \$44.50. The trial in the court of common pleas resulted in a verdict and judgment in her favor in the sum of \$313.50. At the time the payment of \$44.50 was made, she signed an instrument which she delivered to Brown, reading as follows:

"SWANTON, OHIO, September 25, 1909.

"Received of Charles A. Brown the sum of fifty (\$50.00) dollars, the same being in full payment and settlement of note given by him to me of date of March 26, 1908, and said sum is also in full payment of any and all claims of every kind and description which I have against him.

"MISS HARRIET E. FARR."

Miss Farr alleges in her reply after quoting the above instrument that the defendant desired to settle the balance of the note and that he represented to her that he had seen her attorney and that her attorney sent word that she should accept the balance due on the note, and that she should sign the said paper. She avers that Brown said to her that said paper receipt related to, covered and was intended to settle said note, and such matters as grew out of their indenture agreement and nothing else, and that a receipt was necessary because the note was lost. She further avers that it was not true that her attorney had directed that she should sign the paper, but that he had sent no directions whatever, and that she was induced to sign the instrument through the false and fraudulent representations of said defendant, communicated to her as just stated.

Upon the impaneling of a jury in the common pleas court, the defendant below objected to the introduction of any testimony for the reason that the pleadings showed that there was a settlement between the parties and a contract of settlement entered into and set up in the answer and admitted in the reply, and that this contract must stand until set aside by a court of equity. The defendant upon the overruling of that motion, further moved the court for judgment on the pleadings which motion was also overruled, and exception taken to the action of the court upon both motions.

The petition contains no averment that the amount of \$5.50 which is claimed upon the promissory note was due; neither is it averred in the petition that the amount claimed in the second cause of action for services was due, but the second cause of action does contain the averment that the defendant is indebted to her upon the claim therein set forth. The reply contains an averment that she had presented to Brown a statement of the amount due her for services and that he was not disputing that she was entitled to receive from him the amount due on the note.

In view of these allegations and of the language of the Supreme Court in *Yocum v. Allen*, 58 O. S., 280, and also in the case of *Dayton Insurance Co. v. Kelly*, 24 O. S., 345, we think that the judgment ought not to be reversed by reason solely of the defects in the pleadings just stated, and that the action of the

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court in that respect was not such prejudicial error as to require a reversal.

It is insisted, however, that the instrument quoted above, if its validity is to be questioned at all, should be questioned by appropriate allegations contained in the petition rather than in the reply. The instrument itself is plainly in form something more than a receipt and amounts, without doubt, to a contract as well as a receipt. See *Jackson v. Ely*, 57 O. S., 450; *Cassilly v. Cassilly*, 57 O. S., 582. The rule by which it is to be determined whether an instrument of the character set forth must be assailed in the petition, or whether it may be sufficient to set it up in the reply, depends upon whether it is a void instrument or one which is voidable only. The principle of law controlling is laid down by the Supreme Court in *Perry v. O'Neil & Co.*, 78 O. S., 200. A careful examination of the language of the reply leads to the conclusion that if Miss Farr believed the statements to be true, she was led to sign the instrument because she believed it was one of a different character from the one which it was in fact. It is perfectly apparent that she is not a woman of the keenest business sagacity, and that she acted upon the supposition that the instrument was nothing other than a receipt for the amount due upon the note. Such being the case, the instrument would be absolutely void and it would not be necessary to set the same aside either by a separate action or by a separate cause of action in this case, before maintaining an action to recover the amount claimed by her.

An additional reason exists which is sufficient to justify us in reaching that conclusion. The amount actually paid was \$44.50 and beyond all question, at least that amount remained due upon the promissory note and was not in any way in dispute between the parties. It was a liquidated sum and nothing having been paid upon the promissory note, in addition to the amount conceded, no consideration existed for a release of the amount claimed to be due for services. The instrument, therefore, in so far as it purports to be more than a receipt, would be absolutely void. It would be what lawyers term a *nudum pactum*. See *Seeds, Grain & Hay Company v. Conger*, 83 O. S., 169. We find no prejudicial error to have been com-

mitted by the trial court in overruling the motions made by the defendant below for judgment upon the pleadings and for the exclusion of all evidence.

Upon the trial of the case a large amount of evidence was introduced pertaining to the relations existing between the plaintiff below and the family of Charles A. Brown, and to the services performed by her. From the evidence, it appears that from the time she went to live in the family, she continued to reside in the family as a member thereof. She alleged in her reply that she had lived in the family since childhood and that the defendant had occupied the position of a father toward her. The case as made by the allegations contained in the second cause of action, and the pleadings subsequent thereto is one where during the existence of a family relation one member has performed services for the head of the family, and seeks to recover therefor. In the general charge of the court, we find this language:

"The burden is upon the plaintiff as to both causes of action, to prove by a preponderance of the evidence the allegations of her first and second causes of action before she can recover upon them. \* \* \* Before she can recover on the second cause of action, she must prove that there was an agreement between herself and defendant, either express or implied, that she should perform services and that she should be paid for such services."

In view of the circumstances shown by the evidence in this case as to a family relationship existing between the parties to the case, it was manifest error to instruct the jury as was done in the language above quoted. It has long been the established rule in cases of this character that no contract to pay for services rendered would be implied, and that before a recovery can be had, it must appear from the evidence that an express contract to perform the services and to pay for the same existed. The language quoted would authorize a recovery in the absence of an express contract. Again, the instruction permits a recovery if the plaintiff's case on the second cause of action is established by a preponderance of the evidence only. This language is in direct conflict with the rule laid down by the Supreme Court in *Hinkle v. Sage*, 67 O. S., 256, 262. In the case cited the principle

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is announced by our Supreme Court that to entitle a plaintiff to recover under such circumstances, the contract must be established by clear and unequivocal proof. It is true that the case of *Hinkle v. Sage* was an action brought against the estate of a decedent, and in that respect it differs from the case now under consideration. But the language used by the court in the course of the opinion, and also as found in the syllabus is so broad as to embrace an action of this character, whether brought against an executor or administrator or against the head of a family during his lifetime. Were it not for this general language, the members of this court might not be agreed that the rule requiring the plaintiff's case to be established by clear and unequivocal proof should be applied except when the action is against the estate of a deceased person. Much argument may be adduced upon both sides of the question, but we are convinced, in view of the language of this decision, that the rule in our state is equally applicable whether the action be against an administrator or between members of a family still living. A very interesting discussion of this and some other questions may be found in an exhaustive note contained in 11 Lawyers Reports Annotated (New Series), 873-913. Speaking of the degree of proof required the annotator upon page 902 states the rule as follows:

"The emphatic language used is probably to be accounted for, in some measure at least, by the fact that, in the great majority of instances, it was used with relation to claims against the estates of decedents. But, as the statements of the courts are perfectly general, it can not be assumed that the standard specified was regarded as being appropriate only in cases involving such claims."

For the error indicated, prejudicial to the rights of the plaintiff in error, the judgment will be reversed and the cause remanded for further proceedings.

**INSPECTION OF CORPORATION BOOKS BY STOCKHOLDER.**

Circuit Court of Cuyahoga County.

**THE AMERICAN SHIPBUILDING CO. v. FRANK P. WHITNEY.**

Decided, February 12, 1912.

*Corporations—Foreign—Stockholder's Right to inspect Records and Papers.*

A stockholder of a foreign corporation which is doing business in Ohio, after having obtained the right to do so by complying with the laws which provide how a foreign corporation may do business in this state, and has records and papers within the state, has all the rights of inspection of such records and papers as a stockholder in a domestic corporation has.

*Griswold & White and Thompson & Hine, for plaintiff in error.*

*Hoyt, Dustin, Kelley, McKeehan & Andrews, contra.*

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

The American Shipbuilding Company is a corporation for profit, organized under the laws of the state of New Jersey. It is doing business in Ohio, having obtained the right to do so by complying with the laws which provide how a corporation, organized under the laws of another state, may do business in this state. It has property, offices, records and papers here.

Frank P. Whitney is a stockholder in said corporation. He resides here. He has demanded of the officers of said corporation an inspection of certain records and papers of the corporation now in Ohio. This inspection has been refused. His demand for such inspection is not accompanied by any reason given by him for such inspection except that he is a stockholder in the corporation.

He brought a suit in the court of common pleas seeking an injunction against said corporation and its officers to prevent their refusing him this inspection. The corporation bases its refusal upon the ground that until the stockholder shall show a reason for this inspection, he is not entitled to it. The court of

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common pleas decided in favor of the stockholder and granted the injunction, and the proceeding here is for the purpose of determining whether such order of the court shall be sustained.

It is provided by Section 8673 of the General Code of Ohio, that "the books and records of such corporations, at all reasonable times, shall be open to the inspection of their stockholders." This section is found in the chapter providing for the organization and conduct of corporations for profit in Ohio. There is no doubt, therefore, that if this were an Ohio corporation, the stockholder would be entitled to the examination. This is absolutely settled by the case of *The Cincinnati Volksblatt Co. v. Hoffmeister*, 62 O. S., 189. The syllabus of this case reads:

"Injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by Section 3254, Revised Statutes, to inspect the books and records of the corporation.

"The right to inspect does not depend upon the motive or purpose of the stockholder in demanding such inspection and a petition which shows that the plaintiff is a stockholder; that he has requested the defendant to allow him to inspect the books and records of the corporation, and fix a reasonable time for the same, which request has been refused, states a cause of action.

"As incident to such right is the right to have such inspection by a proper agent, and to take copies from such books and records."

It is urged, however, that the statute does not apply to foreign corporations, because the language is that the "books and records of *such* corporations" shall be open to the inspection provided for, and that the word "such" refers to the kind of corporations provided for in the chapter, to-wit, domestic corporations.

It is, however, provided in Section 5508, as amended in 102 O. L., at page 251, Section 119 of the amendment, in these words:

"All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers."

William from her took away from her all right to any payment under this certificate.

The certificate itself provides, among other things:

"The supreme court doth further agree, subject to the proviso hereinafter contained, on the death of the said member being established to the satisfaction of the executive council, to pay to the beneficiary or beneficiaries designated hereon (the said member reserving the power of revocation and substitution of other beneficiaries in accordance with the provisions of the constitution and laws of the order) a mortuary benefit of one thousand dollars, less the amount paid on account of the total and permanent disability benefit," etc.

It is further provided that the certificate is issued "subject to the provisions of the constitution and laws of the order as they existed at the time the said applicant became a member of the order, and as they may be amended from time to time thereafter."

The act of incorporation in the Dominion of Canada, under and by virtue of which the association was created and chartered provides, among other matters, that the purposes of such association shall be:

"A. To unite fraternally all persons entitled to membership under the constitution and laws of the society;

"E. To establish a benefit fund, from which, on satisfactory evidence of the death of a member of the society who has complied with all its lawful requirements, a sum not exceeding \$3,000 shall be paid to the widow, orphans, dependents, or other beneficiary whom the member has designated, or to the personal representative of the member; or from which upon the completion of the expectancy of life of a member, as laid down in said constitution and laws, such shall be paid to himself."

The constitution of the organization provides, among other things:

"The insurance or mortuary benefit of a member shall be paid to the member himself, or to the wife or husband of, or to the affianced wife of, or to the affianced husband of, or to the children of, or to the blood relations of, or to persons dependent on the member."

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It is manifest that if the right to payment of this mortuary benefit depends upon the relation which subsisted between the member and the person named as a beneficiary at the time of the issuing of the certificate, this money should be paid to Blanche Mahar. And it may here be said that if she is not entitled to such payment, she was not prejudiced by the order of the court fixing Rosie Mahar as the person to whom the money should be paid. This is said because objection was made to some evidence offered in support of the proposition that Rosie Mahar and William Mahar were legally married after the divorce between Blanche Mahar and William Mahar. Since, however, it is a matter of indifference to Blanche Mahar to whom this money should be paid provided she is not entitled to receive it, no prejudice came to her because of any ruling upon evidence in relation to the marriage of Rosie Mahar and William Mahar.

Our attention is called by counsel for the plaintiff in error to a considerable number of cases in which it is held that the person designated as the beneficiary, if entitled to be so designated at the time the certificate is issued, remains such beneficiary, notwithstanding a change of relation thereafter occurring between the parties before the death of the person procuring the issuing of the certificate.

The case of *Connecticut Mutual Life Insurance Co. v. Schaefer*, 94 U. S., at page 457, is such case. The second clause of the syllabus reads:

"A policy of life insurance, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured, unless such be the necessary effect of the provisions of the instrument itself. So held, where, subsequently to effecting an insurance by husband and wife, upon their joint lives, payable to the survivor upon the death of either, they were divorced *a vinculo matrimonii*, and she, having thereafter paid the premiums to the time of his death, brought suit on the policy."

In the opinion of this case, Mr. Justice Bradley, at page 461, uses this language:

"We do not hesitate to say, however, that a policy taken out in good faith and valid at its inception, is not avoided by the cessation of the insurable interest unless such be the necessary effect of the provisions of the policy itself."

Other cases cited by counsel support this proposition as applied to regular life insurance companies, but it is to be remembered that the company now being considered is governed by the statutes applicable directly to fraternal beneficiary associations.

In the case of *White v. Brotherhood of American Yeomen*, decided by the Supreme Court of Iowa and found in 99 N. W., at 1071, a case arose under the provisions of Section 1824 of the code of Iowa, and it is said in the second clause of the syllabus:

"The code, Section 1824, provides that no fraternal association shall issue any certificate unless the beneficiary be the husband, wife, relative, legal representative, heir or legatee of such member. An association which expressed its object to be a bestowal of financial benefits on the family, widow, heirs, relations and such others as may be permitted by the laws of the state, and constitution and by-laws, and which permitted a change of beneficiary, issued a certificate payable to a certain person by name, such person being the wife of the member when the certificate was issued. Subsequently she was divorced and the member remarried, but made no change of beneficiary. *Held*: That on the death of the member, the first wife was entitled to the proceeds of the certificate."

In the opinion of this case, Judge Sherwin uses this language:

"The statute provides only for the relationship that shall exist when the certificate is issued, and does not in words, or by fair implication, limit payment to those only who occupy such relation at the time of death. It was the evident intent of the Legislature to prohibit anything in the nature of gambling contracts, and to so limit the beneficiaries as to accomplish such a result."

And further along in the opinion it is said:

"It is a well recognized rule that a policy of life insurance or a designation of a beneficiary, valid in its inception, remains so although the insurable interest or relationship of the beneficiary has ceased, unless it is otherwise stipulated in the contract." Citing *Life Ins. Co. v. Schaefer*, 94 U. S., *supra*, and *Bacon on Benefit Societies*, Section 253.

Turning to the section referred to in Bacon, we find this:

"The general rule undoubtedly is that a policy of life insurance or a designation of beneficiary, valid in its inception, re-

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mains so, although the insurable interest or relationship of the beneficiary has ceased, unless it is otherwise stipulated in the contract."

In support of this a large number of authorities are cited which sustain the doctrine in the text and as stated in the cases from which quotations have hereinbefore been made.

Bacon then follows in these words:

"Where, however, the beneficiaries of members of benefit societies were, by statute, restricted to the family dependents or relations of their members, and a member of one of such societies designated his wife from whom he afterwards was divorced, it was held that she lost her rights under the designation in consequence of such divorce."

This case will seem to be apparently against the authorities, but the reason given is that under the statute the relationship or status must exist at the time of the maturity of the contract. Especially is this true if the regulating statute specifies certain classes to which *payment* of benefits shall be made.

Bacon then calls attention to the Iowa case, *White v. The Brotherhood of American Yeomen*, *supra*, and this, as has already been shown, is reasoned by the court upon the proposition that the statute fixes who may be named as beneficiaries, but it does not fix to whom payment shall be made.

The section of our statute, which has already been quoted, expressly provides that the *payment* of death benefits shall be confined to the family, heirs, relatives by blood, marriage or legal adoption, affianced husband or affianced wife, or to a person or persons dependent on the member.

Attention has already been called to the law of the association which provides for payment to be made to parties other than the beneficiary named, where the payment to the beneficiary would be repugnant to the laws of the state or country at the time of the death of the member causing the certificate to be issued.

The case of *Supreme Commandery, etc., v. Margaret Everding*, 20 C. C., 689, is cited in support of the claim of the plaintiff in error, Blanche Mahar. In that case nothing is said with

reference to the statute of Ohio fixing the persons to whom payment should be made. The decision seems based entirely upon the proposition that the person to whom the money was awarded was the wife of the member at the time the certificate was issued, and was therefore a proper person to be named as beneficiary, and then to reach this conclusion because of the cases which hold that a person, properly a beneficiary at the time of the issuing of the certificate, remains such beneficiary so long as no change of beneficiary is made in the certificate. But the cases cited are those where the policies were issued by regular life insurance companies.

That case was decided by a very able bench, consisting of Judges Scribner, Bentley and Haines, and the opinion was prepared by Judge Haines, for whose opinion we have the highest respect, as has the entire bar of the state. However, that case was decided in 1893. A later case, *Brotherhood, etc., v. Jane Taylor, etc.*, decided by the Circuit Court of Ross County in 1906, holds the contrary doctrine. This case was also decided by a very able court, and we felt disposed to follow this rather than the Lucas county case. In that case there had been a divorce between the member on whose account the certificate was issued and the beneficiary designated in the policy, who was his wife at the time the certificate was issued. The third clause of the syllabus in this case reads:

"Under the laws of Ohio, beneficiary certificates are to be construed with reference to the status of the beneficiary at the time of payment (meaning payment of the loss). The words 'Alice B. Taylor' in the certificate are *descriptio personae*, and may be rejected as surplusage, and the certificate is construed to mean that if there be no wife living, the benefits go to the administratrix in trust for his heirs."

In the opinion in this case, Judge Jones uses this language:

"In the determination of this case, it may be said at the outset that the various rules of law applicable to ordinary life insurance companies do not apply in this case, for the reason that it is provided by statute that such associations shall be exempted from provisions of the insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein."

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We reach the conclusion, both from the spirit and purpose of the statutes in relation to these associations, and from the express language of Section 9467 of the General Code, that there was no error in the decision of the court of common pleas, and the judgment is affirmed.

**ORDER DISALLOWING REPORT OF RECEIVER NOT  
APPEALABLE.**

Circuit Court of Cuyahoga County.

AUGUST BECKER V. CITIZENS REAL ESTATE CO. ET AL.

Decided, February 5, 1912.

*Appeal—Final Order—Order Disallowing Report of Receiver and Ordering an Amended Report Not Appealable.*

An appeal will not lie to the circuit court from an order of the common pleas court disallowing a partial report of a receiver appointed in a case pending in that court and directing the receiver to file an amended report.

*W. W. Hole, for plaintiff.*

*Stearns, Chamberlain & Royon. Parsons & Fitzgerald and Myers & Green, contra.*

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

August Becker brought a suit in the court of common pleas against the Citizens Real Estate Company, a corporation, setting up that he was a creditor of such corporation, and averring other facts, which, if established, would justify the appointment of a receiver to take charge of the property of the corporation, convert it into money and distribute the avails thereof.

Such proceedings were had in this action that Howard A. Byrns was appointed such receiver and as such made a partial report to the court on the 14th day of June, 1911.

On the 6th day of July, 1911, F. L. Wenham, one of the creditors of the corporation, filed objections to this report, specifying

a large number of items for which the receiver had taken credit to himself in the report, and concluding in these words:

"The said receiver has disbursed the funds of said estate, as shown by his partial report, in the payment of unnecessary expenses, the maintenance of an office in the Citizens Building, including office rent, telephone service, the salary of a stenographer and various other items of expense, which are not properly chargeable to said estate; that said report should not be confirmed, but that the said report should be disallowed and the receiver be ordered to file a correct statement of his transactions."

On the 24th day of October, 1911, the court entered its order on this motion in these words:

"The objections of F. L. Wenham to the report of the receiver and motion to disallow same is heard and granted, at the receiver's costs, for which judgment is rendered against him, and said receiver is ordered to file an amended report by November 4, 1911. The amount of the bond for appeal is fixed in the sum of \$200."

The receiver gave his bond for appeal, and did all things necessary to perfect such appeal, provided the order is one from which an appeal may be taken. If this matter is a proper subject of appeal, it is because it comes within the provisions of Section 12224 of the General Code. This section provides that:

"An appeal may be taken to the circuit court by a party, or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist."

We are clearly of the opinion that the order made in this case is not a *final order* within the meaning of the section quoted above. Nobody's rights are fixed by it. The amount which the receiver is to distribute is not fixed. The amount of credits to which the receiver is entitled is not fixed. Nothing is fixed but that the report as a whole is not approved, and the court orders that a new report shall be filed. It is no more final

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than an order sustaining a demurrer to a petition is final, where leave is given to amend the petition.

To construe this order as determining that no part of the credits objected to will be allowed, is to give it a construction which it clearly was not the intention of the court it should have. Had such been the intention of the court, the order should, and doubtless would have been, that certain items of credit claimed would not be allowed, and having specified such as should be so disallowed, there would have been no occasion to require an additional report to be filed, because the report taken in connection with the order would have shown the amount in the receiver's hands to be thereafter accounted for.

If there were no other reasons for holding that this is not a final order, the foregoing would be sufficient, and would require us to sustain the motion to dismiss this appeal.

The case of *Evans v. Dunn*, 26 O. S., 439, relied upon by the appellant does not, as we view it, support his contention. There a final report by a master was filed, stating an account between partners. Exceptions were taken to certain items in the report. The allowance or rejection of these items, or any of them, affected the amount to which each of the parties was entitled. The settlement of this account, the order of the court approving it, disposed of the entire controversy. The court ordered the modification of the report, and as so modified, it was confirmed. This was held to be a *final* order from which an appeal could have been taken. It was not taken, and therefore the court refused to hear evidence touching the questions settled by the order.

Whether any order made by the court of common pleas, in the settlement of the accounts of a receiver, can be appealed from, need not here be determined. Counsel are familiar with the case of *Scheidler v. Railway Co.*, 2 C. C., 453, where the holding is that the only remedy open to the receiver, who feels aggrieved in such a case, is by proceedings in error. See also *R. R. Co. v. Sloan*, 31 O. S., 1.

The motion to dismiss the appeal is sustained.

**DUTY OF PROVIDING A SAFE PLACE TO WORK.**

Court of Appeals for Ashtabula County.

**GUARRINO V. THE UNION DOCK COMPANY ET AL.**

Decided, January 31, 1913.

*Master and Servant—Responsibility as Between a Dock Company and a Steamship Company—For Safety of Employees Unloading Vessel—Assumption of Risk—Ordinary Care.*

Plaintiff, an employee of a dock company, was by the direction of his employer engaged in unloading a steamship belonging to another company. While so engaged he was injured by reason of the unsafe condition of the place where he was working. *Held:*

1. The duty of furnishing a safe place for the plaintiff to work rested on his employer, the dock company, and not on the steamship company.
2. The plaintiff by engaging in the employment, by direction of his employers and without objection on his part, of unloading the boat of another company, did not assume the risk of the unsafe condition of the place where he was working.
3. The duty which plaintiff owed to the steamship company was that of ordinary care only.

*Anderson & Lamb*, for plaintiff in error  
*H. H. McKeehan*, contra.

METCALFE, J.; NORRIS, J., and POLLOCK, J., concur.

The plaintiff in error, Stefano Guarrino, was plaintiff below, and brought this action for damages for injuries occasioned by the alleged negligence of the defendants. Upon the trial at the close of the evidence the trial judge, on motion of the Union Dock Company, directed a verdict in its favor. Thereupon the case was submitted to the jury as between the plaintiff and the Interstate Steamship Company and a verdict was rendered in the favor of the defendant steamship company. The errors here assigned are, first, that the court erred in directing a verdict in favor of the Union Dock Company, and that the court erred in the charge to the jury. The Union Dock Company is the

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owner and operator at Ashtabula Harbor of a number of machines used in unloading iron ore from boats. The Interstate Steamship Company is the owner of a boat known as the B. F. Jones. At the time the plaintiff was injured the B. F. Jones was unloading at the docks of the Union Dock Company, and the machines of the dock company were doing the work of unloading. The men who had charge of the machines and who were doing the work of unloading, including the plaintiff, were in the employ of the Union Dock Company, and not of the Interstate Steamship Company. The hold of the boat where the iron ore is stored consists of several compartments, each of which has a separate hatch. As the machines progressed in the work of unloading it became necessary to move them from one hatch to another, and when they were so moved it was necessary for the workmen who were in the hold of the boat attending to the filling of the hoppers to move to the different hatches as the machines moved. In so doing it was necessary to climb a ladder to the top of the compartment and then travel along a passageway on the side of the boat from one hatch to another. At the time of the accident to the plaintiff the unloading machine upon which the plaintiff was working had been moved from one compartment to another and the plaintiff was going from the one where he had been at work to the one where the machine had been moved. He was going in the usual manner and along the usual route. There was upon the shelf or gangway where the plaintiff was obliged to walk in going from one hatch to another some timbers which are called strong-backs. It was dark in going through the place where these things were left, and the plaintiff, as he came to the top of the ladder and stepped over the side of the hatch onto the gangway or shelf, as it is called by some, stepped upon one of these timbers and was thrown or knocked to the bottom of the boat, and there received some injuries.

There is evidence in the case tending to show that the gangway where these timbers had been left was not a proper place for them, and clearly it was a question for the jury whether or not there was negligence on the part of the defendant companies,

or either of them, in leaving them in that place, and whether or not the plaintiff had been furnished a safe place to work.

The duty of furnishing a safe place for his workmen rests upon the employer, and the fact that the place where the men were working belonged to another company does not excuse the dock company from its duty in that respect in the least, but the fact that the duty of furnishing a safe place in which to work rested upon the dock company could not in any way excuse the steamship company from the consequences of its negligence in leaving the place where the plaintiff was working unsafe. The plaintiff in engaging in the work of unloading boats assumed no greater and no different risk than he would have assumed if the boat had been owned by the dock company, his employer; consequently he did not assume the risk of the unsafe condition of the boat. It being a question for the jury to determine whether or not the place provided by the defendants for the plaintiff to work was a safe place it was error in the trial judge to direct a verdict in favor of the dock company.

Was the charge erroneous? The part of the charge complained of was as follows:

"The plaintiff is presumed to have assumed the risk of such injuries from accident which were incident to the nature and character of the work in which he was engaged, and against which the defendant could not, in the exercise of ordinary care, have protected him."

And again:

"The plaintiff is not entitled to relief against the defendant for injuries resulting from known and obvious dangers avoidable by the exercise of ordinary care on his part, notwithstanding the defendant may have been negligent. Such injuries, together with such as may have happened, if you so find, with no fault on the part of the defendant were assumed by the plaintiff."

The question of assumption of risk is a question between employer and employee. The plaintiff's contract of employment was with the Union Dock Company and not with the Interstate Steamship Company. He did not assume the risk of any neg-

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ligence on the part of the steamship company; neither did he assume the risk of the unsafe condition of the place where he was working. We think, therefore, that the charge is erroneous and misleading, and for these reasons judgment is reversed, as to both of the defendants.

Judgment reversed.

**CUSTOM WITH REFERENCE TO BROKERS' COMMISSIONS.**

Court of Appeals for Hamilton County.

**THE METROPOLITAN BANK & TRUST COMPANY V. NEWCOMB & JENKINS**

Decided, June 21, 1913.

*Custom and Usage—Not a Sufficient Basis for Claim for a Commission for Leasing Property, When—Action by Brokers for Recovery of a Commission.*

The custom of a locality with reference to commissions for leasing property is not binding on a property owner who has no knowledge of such custom, and an action does not lie for recovery of such a commission where it is not based on a contract, expressed or implied.

*Bode & LeBlond*, for plaintiff in error.

*C. J. McDiarmid*, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

The action below was brought to recover a real estate commission for the securing of a lease on rooms used by a Chinese restaurant. The evidence shows that one of the members of the firm of real estate agents made the acquaintance of two Chinamen who were seeking quarters for a high-class restaurant in Cincinnati and proceeded to try to find suitable quarters. Noticing that the rooms above defendant's bank were unoccupied, inquiry was made of the cashier of the bank as to whether they were for rent and the terms. The agent introduced himself to the

cashier by handing him the card of his firm, showing they were real estate agents.

There is no testimony in the record to show that at any time any conversation was had between plaintiffs and defendants indicating that a commission was to be charged the bank for the securing of a tenant for it, and the attitude of the plaintiff throughout the transaction appeared to be as representatives of the lessee. The lease was finally consummated, and plaintiffs seek to collect the commissions fixed by the rule of the real estate exchange of which they are members, claiming that the rule of the real estate exchange has created a custom of the locality, upon which they are entitled to rely.

The record shows that this custom was not known to Mr. Morrison, who represents the bank, nor was it brought home to any officers of the bank during any of the negotiations. Objections were made to the introduction of proof as to the custom, unless knowledge was shown by the defendant of its existence. We are of the opinion that it was error in the court below to allow such evidence to be introduced, there being no evidence sufficient to establish an implied contract between the parties.

There is no question but that plaintiff did represent the lessees; and that being the case, if they assumed to represent—as they claim in this suit they did—the lessor, then, it was error in the trial court to refuse the special charge which was asked by defendant before submission to the jury, which was as follows:

“A real estate broker who assumes to act for both parties can not recover compensation from either party, even on an express promise, until it is clearly shown that each party had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action and had assented to his double employment.”

See cases of *Bell v. McConnell*, 37 O. S., 396; *Capener v. Hogan*, 40 O. S., 203.

Plaintiffs, however, rely upon a contract with defendant. The record fails to show that any contract was entered into by plaintiff with defendant, either express or implied. A motion was made by defendant at the close of all the evidence for an instructed

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verdict in its favor, and this court is of the opinion that it was error in the court below to refuse said motion.

The court therefore is of opinion that the judgment below should be reversed, and that judgment should be entered here for plaintiff in error.

### AS TO AUTHORITY FOR PAYMENT OF CHECKS.

Court of Appeals for Clinton County.

J. C. CUMBERLAND AND CARRIE W. CUMBERLAND v. FARMER'S  
EXCHANGE BANK.

Decided, June, 1914.

*Banks and Banking—Checks Charged by Bank Against the Account of  
an Individual Partner—Estoppel Against Denial of Authority So  
To Do.*

Where a bank had charged a depositor against his account checks issued in payment of the expenses of a partnership of which he was a member, and where his bank book was balanced and his checks returned several times subsequent thereto and no protest was ever made until suit had been brought against him on a note which was renewed after the canceled checks had been returned to him. *Held:* That a jury was justified in a verdict against him.

*H. S. Pulse*, for plaintiff in error.

*C. W. Swain*, contra.

JONES, O. B., J.; SWING, P. J., and JONES, E. H., J., concur.

While there were other points of error urged in the case, the one chiefly relied upon by counsel was that the judgment was against the weight of the evidence and was not sustained by sufficient evidence.

The checks which defendant claimed had been without authority charged against his account by plaintiff below were checks drawn by one Morris for expenses of a business in which he was engaged as a partner with the defendant below, and the bank-book was balanced several times and the checks returned without a protest from the defendant. No claim was made that

they were improperly paid until after the filing of this suit and the note upon which suit was brought was renewed by defendant below without objection after the payment of these checks and without any claim for reduction on account of any unauthorized checks.

We therefore think the jury were justified in their verdict as returned, and as a careful examination of the record fails to disclose any errors prejudicial to the plaintiff in error, the judgment is affirmed.

**PASSENGER STRUCK BY THE BACKING UP OF THE CAR FROM WHICH HE HAD JUST ALIGHTED.**

Court of Appeals for Tuscarawas County.

**THE NORTHERN OHIO TRACTION & LIGHT CO. v. THOMAS E. JENKINS, AS ADMINISTRATOR OF THE ESTATE OF EDMUND F. JENKINS, DECEASED.**

Decided, 1914.

*Negligence—Determination of Questions Relating to, from All the Circumstances of the Case—Technical Errors Should be Disregarded, When.*

1. Whether the striking by a backing car of one who had just alighted therefrom while the car was at a standstill, was due to the negligence of the company or its operatives or to the contributory negligence of the one so injured, is a question for the jury, and their finding where supported by the evidence will not be disturbed by a reviewing court.
2. Nor will the judgment based upon such a finding be disturbed for technical errors in the admission of evidence or the charge of the court, where it appears from the entire record that substantial justice has been rendered under all the circumstances.

**BY THE COURT (VOORHEES, SHIELDS and POWELL, JJ.).**

This was an action commenced in the court of common pleas of this county by the defendant in error, Thomas E. Jenkins, as administrator of the estate of Edmund F. Jenkins, deceased, v. the Northern Ohio Traction & Light Company, plaintiff in error,

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for its negligence in causing one of its cars to run over the said Edmund F. Jenkins and causing his death.

In his petition filed in the court of common pleas the plaintiff alleged, in substance, that he is the duly appointed administrator of the estate of Edmund F. Jenkins, deceased, and that the defendant company is a corporation operating an electric street railway extending in part from Canal Dover through New Philadelphia and Midvale to Uhrichsville in said county.

That on the evening of March 21, 1912, about 6:50 P. M., the said Edmund F. Jenkins was a passenger on one of the defendants' cars from New Philadelphia to Midvale, paying his fare therefor. After riding on said car to a switch near Midvale and after said car had come to a full stop, and after the conductor on said car was made aware of the fact that the said Edmund F. Jenkins would alight at said switch, said conductor consenting, the said Edmund F. Jenkins, after said car came to a full stop, alighted from said car from the rear platform on the south side thereof, and after so alighting he started for his destination by attempting to cross said defendant company's track by passing around and in the rear of said car, which was not then in motion, and at a distance of several feet therefrom, when, without his fault, the defendant, by its conductor and motorman who were in charge and control of said car then on said main track, caused said car to suddenly start and move at a high rate of speed backward and in an opposite direction, to-wit, northwesterly, from that in which it had been running, wrongfully, negligently, carelessly and unskillfully moving said car backward and in the direction toward where the said Edmund F. Jenkins was crossing said track, and that in so moving said car backward as aforesaid, without any signal being given by the defendant or its agents or employees, and without the ringing of any bell, or the sounding of a gong, or the blowing of any whistle, or giving any notice or alarm whatever of the starting of said car, or of its change of direction, with no light on the rear end of said car, the said Edmund F. Jenkins was, without any negligence or fault on his part, run over by the defendant's said car, and was crushed and mangled under and between the wheels and trucks thereof, of which

injuries he died within a few hours afterwards; all of which was caused by the wrongful, negligent, reckless, unskillful and unlawful acts of the defendant, its agents, servants and employees, in the management and control of said car; and plaintiff averred that said personal injuries and death which ensued resulted to the said Edmund F. Jenkins as a direct, natural and proximate consequence of said acts of the defendant.

The petition then avers that the said Edmund F. Jenkins left surviving him his widow and children, all of whom were dependent upon him for support; and damages are prayed for against the defendant company by said administrator in the sum of ten thousand dollars.

The defendant filed an answer to the foregoing petition, admitting that on March 21, 1912, the said Edmund F. Jenkins was a passenger on one of its cars from New Philadelphia to Midvale, and paid his fare, but that he voluntarily left said car when the same was near Midvale and that thereafter he walked in front thereof when it was moving backward and was struck by said car, causing injuries to his person from which he died shortly thereafter. It denies the negligence charged in said petition and avers that the injuries so received by the said Edmund F. Jenkins were the result of his carelessness and negligence, and it denies all the other allegations in said petition not specifically admitted to be true.

For a second defense the defendant sets up that before said car stopped at Midvale and while said car was in motion, and against the protest of the conductor of the said car, the said Edmund F. Jenkins left said car, and after alighting therefrom, and after it traveled some distance in the direction it was going, said car backed in an opposite direction upon its track and the said Edmund F. Jenkins carelessly and negligently, and in full view of said car so moving upon said track, stepped upon said track at a time when said car was so near to him that it was impossible for the parties in charge thereof in the exercise of ordinary care to have stopped the same, and what when it was impossible to stop said car in time to avoid striking him and when, if he had looked, he could have seen, and if he had listened he could have heard, said car approaching just before or at the

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time when he stepped upon said track, and thereby have avoided being struck by said car, and have avoided receiving said injuries which caused his death; that said injuries so received were the result of his own carelessness and negligence in going upon said track in full view of said approaching car. The defendant denies that it was negligent in the operation of its said car, and denies that said Edmund F. Jenkins received his injuries because of any carelessness of the defendant, but avers that his injuries and death were caused by his carelessness and negligence as before stated.

To this answer, the plaintiff filed a reply, denying that said injuries received by the said Edmund F. Jenkins, from which he shortly thereafter died, were so received by him because of his own carelessness and negligence, as alleged in the defendant's first and second grounds of defense.

Upon the issues made by the foregoing pleadings the case was submitted to a jury, resulting in a verdict of \$2,500 in favor of the plaintiff. A motion for a new trial was overruled, and judgment was entered upon said verdict. A bill of exceptions was taken containing the evidence upon the trial, including the charge of the court to the jury, and by a petition in error said cause is brought before this court for review and for a reversal of said judgment of the said court of common pleas.

In said petition in error various grounds of error are alleged, among which is that said court erred in the admission and rejection of evidence offered upon said trial. An examination of said bill of exceptions fails to disclose that the action of said court resulted in working any prejudicial error to the plaintiff in error on either of said grounds. In several instances it appears that evidence was admitted against the objection of the defendant below which under the rules of evidence was perhaps not strictly proper, but the effect of such evidence was in nowise prejudicial to the legal rights of the plaintiff in error, and we therefore hold that the contention of the plaintiff in error in this respect is not sustained.

It is also contended that the court below erred in overruling the motion of the defendant below at the close of plaintiff's testimony, and a like motion was overruled at the close of the

entire case, to arrest said case from the jury and direct a verdict for the defendant below. A reading of said bill of exceptions shows that the action of said court in this respect was well warranted in the light of the evidence contained therein.

It is also urged that the court below erred in refusing to give to the jury, before argument, certain written requests submitted to said court by the defendant below; and in giving in its charge to the jury certain written requests of the plaintiff below, to which the plaintiff in error excepted at the time. The requests which said court refused to give to the jury are No. 1 and No. 2, which, for obvious reasons, under the undisputed evidence in the case, we think were properly refused.

It is also contended that said court erred in its general charge to the jury upon the subject of looking and listening for an approaching car before going upon the track of said company, in this, that said court failed to give to the jury the rule laid down in the Kistler case, 66 O. S., page 326, wherein it is held that,

“The looking required before going upon a crossing should usually be just before going upon the track,” etc.

This is just what the trial court did charge.

Written request No. 4 submitted by counsel for the defendant below to be given in the charge to the jury before argument, reads:

“The court charges you as a matter of law that it was the duty of Edmund F. Jenkins just before he stepped upon the tracks of the defendant company to both look and listen for an approaching car,” etc.

The foregoing request was given to the jury by said court verbatim. Under Sub-division 5 of Section 11447 of the General Code, it was the undoubted right of the plaintiff in error to have the jury instructed upon the law of the case; and to this end it was the duty of the trial court to give in the charge to the jury all proper and reasonable requests made by the plaintiff in error if they contained sound propositions of law. But it is likewise true that the trial court was not called upon to repeat such

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instructions, for if they were once given, the duty of said court was discharged, there being no necessity to repeat the same instructions even though in different and varying forms.

Of the various written requests to be given to the jury, before argument, submitted by the plaintiff below, it appears that but one of them was given, and that related to the question of damages, where the rule as given is approved by the courts of this state generally.

It is also urged that the verdict of the jury is unsupported by the evidence; that it is against the weight of the evidence, and contrary to law. On account of the insistence of counsel we have carefully read this entire record with special reference to this assignment of error. Notwithstanding the claim made by the conductor in charge of the car upon which the decedent and his son rode from New Philadelphia to the Midvale switch the evening in question, we think the testimony of the son and other passengers on said car clearly showed that said conductor did volunteer the information to the deceased and his son that they could get off said car at said switch, and that decedent after the car stopped at said place, did get off.

Whatever he may have done before that evening in alighting there from a car when in motion is immaterial, as the uncontradicted evidence is that on this evening he alighted from the car after it had stopped; and whether he exercised ordinary care in attempting to cross the company's track after getting off of said car was a question for the jury in view of all the circumstances in the case. Both the alleged negligence of the company and the alleged contributory negligence of the decedent were questions of fact for the jury; and in their determination of these questions it was proper for them to consider whether or not the plaintiff in error had in its employ and service at that time experienced and competent servants managing said car, having in its charge passengers who it had undertaken to safely deliver at their destination; whether or not the plaintiff in error, by its agents and employees, signaled the backing of said car on the track, and had at said place an employee on the rear of said car while so backing, as called for by the rules of said company, and as a proper regard for the safety of persons

who might be crossing said track, in the exercise of ordinary care, required; and whether or not the machinery and equipment of said car was in proper repair. We refer to these features of the case because of the evidence introduced upon the trial respecting them and which it was the province and duty of the jury to consider in connection with the charge of negligence here made against said company. Indeed, as we view the case, the determination of the above questions may have determined the action of the jury, and these questions being questions of fact, it was the province of the jury to pass upon them; and having passed upon them, we do not think that this court, as a reviewing court, under the evidence presented in said bill of exceptions, should disturb the finding of the jury.

As stated, we have read this entire record with no little care, and we think that the case was fairly tried; that the rights of the defendant below were properly protected and cared for by the action of the court below in its charge to the jury; that said charge was exhaustive and fair to both parties; and taking it all in all we are of the opinion that the verdict of the jury is not unsupported by the evidence, nor against the manifest weight of the evidence, nor contrary to law; and furthermore, we are of the opinion that the action of said jury by their verdict, and the judgment of said court, express nothing further than the rendition of substantial justice between the parties hereto. In the trial of cases occupying no little time it is not uncommon for technical errors to intervene; but where all the evidence taken upon the trial, including the charge of the trial judge, is before a reviewing court and such court determines that under all the circumstances substantial justice has been done, the judgment will not be reversed for error in the charge of the court below. *Way & Co. v. Langley*, 15 O. S., 392; *Baird v. Burton Telephone Co.*, 10 C.C.(N.S.), 163.

The judgment of the court of common pleas will be affirmed, at the costs of the plaintiff in error. Exceptions may be noted.

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